No. 84-1095

Office Supreme Court, U.S.
FILED
DEC 20 1984
ALEXANDER L. STEVAS
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In The

Supreme Court of the United States

October Term, 1984

HENRY B. FITZPATRICK, JR.,

Petitioner,

vs.

I. V. DiMARTINO, A.J.S.C. AND THE SUPERIOR COURT, LAW DIVISION, GLOUCESTER COUNTY, NEW JERSEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Was respondents' refusal to admit petitioner *pro hac vice* under New Jersey Court Rules, 1969, R. 1:21-2, in the absence of a finding that he is unfit or that substantial reasons exist that would justify his exclusion, a violation of rights secured to petitioner under Article IV, §2 of the United States Constitution and under the Fourteenth Amendment to the United States Constitution?

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No.

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OPINIONS BELOW

The Court of Appeals filed no opinion. The letter which accompanied the order of the District Court is set forth in the Appendix at 3a-6a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered September 21, 1984. This petition was filed within ninety days of that date.

Jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTE AND RULE INVOLVED

Article IV, §2 — Privileges and Immunities

> Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983 — Civil Action of Deprivation of Rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of

the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

New Jersey Court Rules, 1969, R.1:21-2

Appearances Pro Hac Vice

An attorney of any other jurisdiction, of good standing there, whether practicing law in such other jurisdiction as an individual, or a member or employee of a partnership, or an employee of a professional corporation authorized to practice law in such other jurisdiction, or an attorney admitted in this State, of good standing, who is not domiciled in this State and who does not maintain in this State his principal office for the practice of law, may, at the discretion of the court in which any matter is pending, be permitted, pro hac vice, to speak in such matter in the same manner as an attorney of this State who is domiciled in or maintains in this State his principal office for the practice of law; and who is therefore, pursuant to R.1:21-l(a) authorized to practice in this State; provided, however, that all pleadings, briefs and other papers filed with the court shall be signed by an attorney of record authorized to practice in this State, who shall be held responsible for them

and for the conduct of the cause and of the admitted attorney therein.

STATEMENT OF THE CASE

In the fall of 1981 Richard W. Coleman engaged petitioner, Henry B. FitzPatrick, Jr., to represent him in his personal injury claim against Roy L. Gorin, M.D. The claim was based on Gorin's alleged negligence in his diagnosis and treatment of Coleman. Both Coleman and Gorin were residents of New Jersey and all the pertinent activities had taken place in that state. FitzPatrick was (and still is) an attorney admitted to the bar of Pennsylvania practicing primarily in Philadelphia and maintaining offices there and in Delaware and Lycoming Counties, Pennsylvania.

On May 7, 1982, at FitzPatrick's request, Diana B. Gittleman, a member of the New Jersey Bar, filed a complaint entitled *Richard W. Coleman v. Roy L. Gorin, M.D.* in the Superior Court of New Jersey, Law Division, Gloucester County, Docket No. -44136-81. Gittleman then filed a motion pursuant to New Jersey Court Rules, 1969, R. 1:21-2 for the admission of FitzPatrick *pro hac vice* as additional counsel for Richard Coleman.

On May 21, 1982, a hearing on the motion was held before respondent, DiMartino. The affidavits of Coleman and FitzPatrick were presented and Gittleman and FitzPatrick testified. There was no opposition to the motion. Judge DiMartino stated:

> The Court: I am concerned about changing precedent. I have been the Assignment Judge of Camden County for about eight months. I have only allowed the admission pro hac vice once, and even that case I would not have allowed it had my predecessor not already verbally ruled that application should be granted.

(*See* Appendix at 13a.)

Judge DiMartino stated that he was applying New Jersey Court Rule R.1:21-2 in accordance with the opinion in the case of *Burlington County Internal Medicine Associates, P.A. v. American Medicorp, Inc.*, 168 N.J. Super. 382, 403 A.2d 43 (Ch. 1979). (*See* Appendix at 13a.) Paraphrasing that case, Judge DiMartino listed those things which a nonresident of New Jersey must establish in order to be permitted to appear for his client in a New Jersey court:

> He [the Judge who wrote the *Burlington County* opinion] indicates there must be evidence before the court that foreign counsel is of good standing in his own state. I have absolutely no doubt of that in this case.
>
> The opinion also indicates foreign counsel by affidavit should indicate that he has maintained his competency as an attorney particularly in any specialization which he claims, and I am completely satisfied that is so here.
>
> However, there also has to be shown good cause showing that the case involves a complex field of law, and no one here is going to in any way imply to me, nor can I accept that a medical malpractice case is foreign to the intelligence and competency of local counsel.
>
> There also has to be shown a longheld attorney-client relationship. I don't see any such relationship here. There is a relationship that arises out of this case. Even more importantly, the next item, there must be shown a lack of local counsel with expertise in the field involved. I have already indicated, as a matter of fact, I consider your firm

> very competent. . . . I don't see anything complexed about this case that New Jersey counsel cannot handle.

(*See* Appendix at 13a-14a.)

Judge DiMartino denied the motion from the bench and filed a written order on June 7, 1982.

On June 22, 1982, FitzPatrick filed a motion for leave to appeal an interlocutory order in the Superior Court of New Jersey, Appellate Division which was denied on July 12, 1982.

On July 28, 1982, FitzPatrick filed a motion for leave to appeal an interlocutory order in the Supreme Court of New Jersey which was denied on October 26, 1982.

On June 3, 1983, petitioner filed a complaint against respondents, DiMartino and the Superior Court of New Jersey, in the United States District Court for the District of New Jersey requesting injunctive relief and a declaration "that the refusal to permit his admission *pro hac vice* in the absence of a specific finding that he is unfit or that substantial reasons exist which would justify his exclusion constitutes a violation of his rights under Article IV, §2 of the United States Constitution and under the Fourteenth Amendment to the United States Constitution." Jurisdiction in the District Court was asserted under 28 U.S.C. §1343(3) and (4) and 42 U.S.C. §1983.

On December 18, 1983, respondents filed a motion to dismiss which was granted by order dated January 26, 1984.

Petitioner's appeal to the United States Court of Appeals for the Third Circuit was dismissed by order entered September 21, 1984. It is that judgment which petitioner requests this Court to review.

REASON FOR GRANTING THE WRIT

I.

Respondents' application of New Jersey Court Rules, 1969, R. 1:21-2 to deny petitioner's motion for admission *pro hac vice* is a violation of petitioner's rights secured to him by Article IV, §2 of the United States Constitution and by the Fourteenth Amendment to the United States Constitution.

Article IV, §2 of the Constitution, so far as relevant, provides:

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

This Court has stated:

> The primary purpose of this clause, like the clauses between which it is located — those relating to full faith and credit and to interstate extradition of fugitives from justice — was to help fuse into one Nation a collection of independent, sovereign States. It was designed to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy.

Toomer v. Witsell, 334 U.S. 385, 395 (1948), *citing Paul v. Virginia,* 8 Wall. 168, 180-81 (1868) *and Travis v. Yale & Towne Mfg. Co.,* 252 U.S. 60, 78 (1920).

This Court has not decided whether the clause insures to a lawyer, citizen[1] of State A, who ventures into State B, the same

1. Although this Court has not always equated state residency with state citizenship, this Court has stated: "it is now established that the terms 'citizen' (Cont'd)

privileges regarding the practice of his profession which the citizens of State B enjoy.[2] This Court has held, however, referring to the underlying purpose of the clause, that:

> It was long ago decided that one of the privileges which the clause guarantees to citizens of State A is that of doing business in State B on terms of substantial equality with the citizens of that State.

Toomer v. Witsell, supra, at 396, *citing Ward v. Maryland,* 12 Wall. 418 (1870) *and also, Chalker v. Birmingham & N.W.R. Co.,* 249 U.S. 522 (1919); *Shaffer v. Carter,* 252 U.S. 37, 52-53 (1920).

In *Toomer v. Witsell, supra,* this Court went on, pointing out that:

> Like many other constitutional provisions, the privileges and immunities clause is not an absolute. It does bar discrimination against citizens of other States where there is no substantial reason for the discrimination beyond the mere fact that they are

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(Cont'd)

and 'resident' are 'essentially interchangeable' ", *Hicklin v. Orbeck,* 437 U.S. 518, 524 n.8 (1978), *citing Austin v. New Hampshire,* 420 U.S. 656, 662 n.8 (1975).

2. The case of *Piper v. Supreme Court of New Hampshire,* 104 S. Ct. 2149 (1984), argued before this Court on October 31, 1984, presents the question of whether the Privileges and Immunities Clause prevents a state from imposing residency requirements on admission to the bar. This Court has previously decided that the Equal Protection Clause of the Fourteenth Amendment prohibits a state from denying admission to the bar to applicants who are not citizens of the United States, *In re Griffiths,* 413 U.S. 717 (1973); and that the Due Process Clause of the Fourteenth Amendment does not afford procedural due process rights to applicants seeking *pro hac vice* admission, *Leis v. Flynt,* 439 U.S. 438 (1979).

> citizens of other States. But it does not preclude disparity of treatment in many situations where there are perfectly valid independent reasons for it. Thus the inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the States should have considerable leeway in analyzing local evils and in prescribing appropriate cures.

Id. at 396.

Thus there is no absolute proscription of a state's establishing disparate treatment of nonresidents. In has been held that as to certain activities a state may discriminate against nonresidents on the basis of their nonresidence alone. These, however, include only those activities which are closely related to the state's need to preserve its sovereign identity.

In *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 383 (1978) this Court offered some examples of these activities:

> Suffrage, for example, always has been understood to be tied to an individual's identification with a particular State. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). No one would suggest that the Privileges and Immunities Clause requires a State to open its polls to a person who declines to assert that the State is the only one where he claims a right to vote. The same is true as to qualification for an elective office of the State. *Kanapaux v. Ellisor*, 419 U.S.

891, 95 S.Ct. 169, 42 L.Ed.2d 136 (1974); *Chimento v. Stark*, 353 F.Supp. 1211 (D.N.H. 1973), *summarily aff'd*, 414 U.S. 802, 94 S.Ct. 125, 38 L.Ed.2d 39 (1973).

Neither in *Baldwin* nor *Hicklin*[3] did this Court precisely describe the boundaries of the sovereign identity exception but the *Baldwin* citation to *Dunn v. Blumstein*, decided on equal protection grounds, suggests that this Court sees some measure of similarity in cases where claims of discrimination on the basis of citizenship were being made under the Equal Protection Clause. In *Sugarman v. Dougall,* 413 U.S. 634 (1973), this Court held, on equal protection grounds, that a New York statute which required all civil service employees to be citizens of the United States was an invalid discrimination on the basis of citizenship not justified by any need to maintain the sovereign identity of the State of New York. In that case this Court described in a more general way the types of activities for which citizenship requirements may be prescribed:

> Neither do we hold that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office. . . . [T]his power of the State applies not only to the qualifications of voters, but also to persons holding state elective or important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formation, execution, or review of broad public policy perform functions that go to the heart of representative government.

Id. at 647.

---

3. The only cases decided since *Toomer v. Witsell, supra*, by this Court squarely dealing with claims under the Privileges and Immunities Clause.

The question of whether the practice of law is an activity so closely related to the state's sovereign, separate existence that noncitizens of the United States could be denied admission to the bar of Connecticut was addressed by this Court in *In re Griffiths*, 413 U.S. 717 (1973). It was there held that the Equal Protection Clause prohibited such discrimination and Mr. Justice Black's opinion in *Cammer v. United States*, 350 U.S. 399, 405 (1956) was quoted:

> "It has been stated many times that lawyers are 'officers of the court.' One of the most frequently repeated statements to this effect appears in *Ex parte Garland*, 4 Wall. 333, 378. The Court pointed out there, however, that an attorney was not an 'officer' within the ordinary meaning of that term. Certainly nothing that was said in *Ex parte Garland* or in any other case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks or judges. Unlike these officials a lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business. The word 'officer' as it has always been applied to lawyers conveys quite a different meaning from the word 'officer' as applied to people serving as officers within the conventional meaning of that term."

(Footnote omitted.)

Finally the Court said:

> Lawyers do indeed occupy professional positions of responsibility and influence that

> impose on them duties correlative with their vital right of access to the courts . . . .Yet, they are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy.

In re Griffiths, *supra*, at 728-29 (footnote omitted). It would seem that the activities of lawyers as formulators of government policy should appear the same whether viewed through the lens of the Equal Protection Clause or of the Privileges and Immunities Clause.

This Court has always held that the Privileges and Immunities Clause protects nonresidents seeking to ply their trade, practice their occupation, or pursue a common calling from state discrimination.[4] *Ward v. Maryland*, 12 Wall. 418 (1871) (Maryland statute discriminating against nonresidents desiring to do business in Maryland); *Toomer v. Witsell*, *supra* (South Carolina statute discriminating against nonresidents desiring to shrimp in South Carolina); *Mullaney v. Anderson*, 342 U.S. 415 (1952) (Alaska statute discriminating against nonresidents desiring to fish in Alaska) and *Hicklin v. Orbeck*, *supra* (Alaska statute discriminating against nonresidents desiring to work in Alaska).

In deciding cases under the Privileges and Immunities Clause where claims of discrimination are made by nonresidents this Court has followed standards which it articulated in *Toomer* and *Hicklin*.

There are two standards:

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4. At the other end of the spectrum of activities are those which are trivial or at least do not rise to a level of import deserving of the protection of the Privileges and Immunities Clause. Elk hunting was held to be such an activity. *Baldwin v. Fish and Game Commission of Montana*, *supra*.

First, it must be shown that nonresidents constitute a peculiar source of evil at which the statute is aimed.[5] Second, the discrimination practiced upon nonresidents must bear a substantial relationship to the particular evil they are said to present.[6] In this case neither of these standards are met.

The rule in question, New Jersey Court Rules, 1969, R. 1:21-2, impermissibly discriminates against nonresident lawyers by requiring them to meet a number of standards which have no relation whatsoever to any evil, or the protection therefrom, as a condition to their admission *pro hac vice*.

It cannot be disputed that New Jersey has the right to protect its citizens against the practice of law by lawyers who do not meet reasonable standards of competence and integrity. Insofar as R. 1:21-2 attempts to accomplish this it can meet with no constitutional complaint. Insofar as it attempts, however, to impose conditions on admission *pro hac vice* which are not so related it despoils rights secured by the Privileges and Immunities Clause and by the Equal Protection Clause. *Hicklin v. Orbeck*, *supra*; *Toomer v. Witsell*, *supra* and *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957). In *Schware*, an equal protection case, this Court held that:

> A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law.

Id. at 239.

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5. *Toomer v. Witsell*, *supra*, 334 U.S. at 398; *Hicklin v. Orbeck*, *supra*, 437 U.S. at 526.

6. *Toomer v. Witsell*, *supra*, 334 U.S. at 398, 403; *Hicklin v. Orbeck*, *supra*, 437 U.S. at 527.

At the time petitioner's motion for admission *pro hac* vice was decided the rule simply provided that admission of a nonresident attorney may be allowed at the discretion of the court.[7] There existed as well a decision of the Superior Court of New Jersey[8] which set forth standards for the exercise of the discretion mentioned in the rule. In the words of that court the exercise of that discretion was to be as follows:

> The matter is one for the conscientious exercise of my discretion, [citation omitted] which requires certain basic information to be supplied by [foreign] counsel. This consists of proof
>
> (1) that foreign counsel is of good standing in his state and is associated with New Jersey counsel of good standing here . . . .
>
> (2) by affidavit of foreign counsel, that he has maintained his competence as an attorney, particularly in any specialization which he claims, through experience, schools, lectures and readings;
>
> (3) by letter of defendant, that it desires to be represented by Pennsylvania counsel in New Jersey, stating reasons;
>
> (4) good cause, presented in affidavit form, which may consist of:
>
> (a) a showing that the cause involves a complex field of law in which counsel is a specialist,
>
> (b) a long held attorney-client relationship,
>
> (c) lack of local counsel with expertise in the field involved,

---

7. The text of the rule is set out above.

8. *Burlington County Internal Medicine Associates, P.A. v. American Medicorp, Inc.*, 168 N.J. Super. 382, 403 A.2d 43 (1979).

(d) the existence of legal questions involving the law of the foreign jurisdiction,

(e) the need for extensive discovery proceedings in the foreign jurisdiction.[9]

Id. at 384, 403 A.2d at 44.

There is, at least presumptively, the potential evil threatening New Jersey that unqualified or unprincipled lawyers from outside the state may seek admission — either *pro hac vice* or for admission permanently. Thus the first three conditions set out in the *Burlington* case are in all respects proper and appropriate.[10]

The first requirement — that foreign counsel prove that he "is of good standing in his state" — is really not discriminatory at all: New Jersey lawyers must be of good standing in their state as well. So this condition is entirely appropriate.

The second condition — that foreign counsel prove that "he has maintained his competence as an attorney, particularly in any specialization which he claims, through experience, schools, lectures and readings" — does discriminate against nonresidents as no such demand is made on members of the New Jersey bar, nevertheless, since this is clearly and reasonably designed to deal with a real potential "evil", the *Hicklin* tests are met.

In this case petitioner has met these standards. Judge DiMartino acknowledged on the record that FitzPatrick was both competent and in good standing.

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9. In January 1984 the Supreme Court of New Jersey incorporated the conditions set forth in the *Burlington County* case into R. 1:21-2 by amendment effective February 15, 1984.

10. The third condition is subject to question insofar as it requires the client to state reasons for his wish to be represented by a nonresident. Thus the client is placed in the position of justifying his desire for, presumably, his reasons must be such as please the judge.

> He [the judge who wrote the *Burlington County* opinion] indicates there must be evidence before the court that foreign counsel is of good standing in his own state. I have absolutely no doubt of that in this case.
>
> The opinion also indicates foreign counsel by affidavit should indicate that he has maintained his competency as an attorney particularly in any specialization which he claims, and I am completely satisfied that is so here.

(*See* Appendix, 13a.)

Having made that finding there is simply no constitutional justification for the imposition of any other conditions on admission. There is simply no "evil" threatened. As this Court stated in *Schware v. Board of Bar Examiners, supra*, 353 U.S. at 239:

> [A]ny qualification must have a rational connection with the applicant's fitness or capacity to practice law.[11]

Even so, an examination of the other conditions prescribed for consideration on motions for admission *pro hac vice* demonstrates that (a) they discriminate against nonresidents and

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11. *Schware* was a case under the Equal Protection Clause of the Fourteenth Amendment; but there is nothing in any case decided under that clause or under the Privileges and Immunities Clause of Article IV, §2 which gives the slightest indication that this statement should have any less poignancy in a case brought under the latter.

Also, the statement in *Schware* refers to the standards a State may prescribe for an applicant for admission to the bar; there is no reason why the same constitutional constraints should not apply when one seeks admission *pro hac vice*.

(b) they are not in any way designed to deal with any constitutionally cognizable evil. Respondents are, nevertheless, required to apply these conditions in all cases. Judge DiMartino applied them and denied petitioner's motion, stating:

> However, there also has to be shown good cause showing that the case involves a complex field of law, and no one here is going to in any way imply to me, nor can I accept that a medical malpractice case is foreign to the intelligence and competency of local counsel.
>
> There also has to be shown a longheld attorney-client relationship. I don't see any such relationship here. There is a relationship that arises out of this case.
>
> Even more importantly, the next item, there must be shown a lack of local counsel with expertise in the field involved. I have already indicated, as a matter of fact, I consider your firm very competent. . . . I don't see anything complexed about this case that New Jersey counsel can not handle.

(*See* Appendix, 13a-14a.)

It is not known how any of these items advance the protection of those citizens of New Jersey who might wish to be represented by nonresidents about whose good standing at the bar the trial judge has "absolutely no doubt" and about whose competency as attorneys he is "completely satisfied."

It is coincidentally fortunate that the Supreme Court of New Jersey had occasion recently to address the fundamental question of the putative "evil" presented by the practice of nonresident attorneys in New Jersey. In *In re Sackman*, 90 N.J. 521, 448 A.

2d 1014 (1982), the court had before it a challenge to its rule R. 1:21-l(a) which required, as a condition for the admission of a non-domiciliary lawyer to the bar of New Jersey, that he maintain his principal office there. This contrasted with the rule for domiciliaries of New Jersey for whom the requirement was merely a bona fide office. The court did not reach the constitional questions for it amended the rule making the office requirement the same for domiciliaries and non-domiciliaries.

With disarming candor the New Jersey Supreme Court identified the potential "evil" as perceived in that state as follows:

> The rule has been amended several times and has been the subject of much debate. It represents the continuing effort to determine where the public interest lies when non-domiciliaries seek to practice law. If such practice poses a risk to the public, nowhere is it greater than in New Jersey. Located between two large states that are major commercial and industrial centers, with New York City and Philadelphia directly on our borders, New Jersey is a natural place to practice for many residents of New York and Pennsylvania. Similarly, many New Jersey domiciliaries practice in those states.

90 N.J. at 525, 448 A. 2d at 1017. Of course, a perceived threat to the financial well being of in-state lawyers is not such an interest which a state may protect by leveling discriminatory rules at out-of-state lawyers.[12] The Supreme Court of New Jersey recognizes this and in the course of its Opinion in *Sackman* announced its view of the policy of that state on the broad subject of the practice of law in New Jersey by nonresident lawyers:

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12. *See Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978); *Piper v. Supreme Court of New Hampshire*, 723 F.2d 110, 117 (1st Cir. 1983), *probable jurisdiction noted*, 104 S. Ct. 2149 (1984); *Enquire Printing & Publishing Co. v. O'Reilly*, 193 Conn. 370, 477 A.2d 648 (1984).

We have concluded that the public would be better served if licensed New Jersey attorneys residing, for example, in New York and Philadelphia were subject to no greater restrictions in their practice in New Jersey than those residing in Newark and Camden. The risks, if any, to the public arising from the potential lack of contact of non-domiciliary attorneys with New Jersey are not significantly greater than the same risks that arise when licensed New Jersey attorneys, living in Newark or Camden, practice almost exclusively in New York City or Philadelphia. In any event, the difference in risk is substantially outweighed by the advantage to the public of allowing such out-of-state attorneys to practice here.

What is the public interest here? It is to make more qualified lawyers available to New Jersey's citizens. That interest is achieved by eliminating restrictions that reason and experience have shown are not needed for the public's protection.

No one before us has suggested that the public interest would be served by a limitation on the number of lawyers authorized to practice in New Jersey. Whether the financial interest of the bar would be served by any such limitation is irrelevant unless and until that financial interest can be equated with the public interest, which we doubt it ever could. We assume, and believe, that the more qualified lawyers in New Jersey, the better the public will be served; that potential clients of all income levels will benefit from more lawyers being available; that the increase in competition may have the beneficial effect of lowering fees; that if any risks to the public interest are caused

> by such increased competition, they can be controlled by this Court; and that the adverse economic impact, if any, on laywers now practicing in New Jersey is no more relevant to the issue before us than it is to the number of new attorneys admitted as a result of each new bar examination.

90 N.J. at 527, 448 A.2d at 1019 (emphasis added).

It cannot be seriously argued that requirements that an applicant for *pro hac vice* admission prove that the case he seeks to try be of some special [though undefined] complexity; or that he prove that he has a long held attorney-client relationship with the person who is requesting his services; or that he prove that there is no lawyer in the State of New Jersey who is qualified to handle the case, are "needed for the public's protection."

It is submitted that the imposition of *any* of these requirements as a condition for *pro hac vice* admission is impermissible under Article IV, §2 of the United States Constitution as interpreted by this Court, especially in *Toomer v. Witsell, supra, and Hicklin v. Orbeck, supra.* It is submitted that in a case where it is established that the nonresident attorney is fit and capable, the imposition of *any* requirement of a "good cause" showing is impermissible[13]: in such case there simply is no "evil".

During the last few years a number of courts have invalidated various types of residency requirements for admission to state bars as violative of the Privileges and Immunities Clause of Article IV, §2 of the Constitution. *Piper v. Supreme Court of New Hampshire*, 723 F.2d 110 (1st Cir. 1983), probable jurisdiction

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13. *See Silverman v. Browning*, 359 F.Supp. 173, 178-79 (D.Conn. 1972), (concurring opinion).

noted, 104 S. Ct. 2149 (1984)[14]; *Stalland v. South Dakota Board of Bar Examiners,* 530 F. Supp. 155 (D.S.D. 1982); *Strauss v. Alabama State Bar,* 520 F. Supp. 173 (N.D. Ala. 1981); *Noll v. Alaska Bar Association,* 649 P.2d 641 (Alaska 1982); *Sheley v. Alaska Bar Association*, 620 P.2d 640 (Alaska 1980); *Matter of Jadd*, 391 Mass. 227, 461 N.E. 2d 760 (1984); *Matter of Gordon*, 48 N.Y. 2d 266, 422 N.Y.S. 2d 641, 397 N.E. 2d 1309 (1979); *Sargus v. West Virginia Board of Law Examiners*, 294 S.E. 2d 440 (W. Va. 1982).

It is submitted that the interest of laywers who seek admission *pro hac vice* ("[f]or this turn; for this one particular occasion")[15] in a state where they do not reside is little different and no less than the interest of those nonresident lawyers who seek admission to the bar generally.

Admission *pro hac* vice is not a recent vogue; it is a custom that was recognized as early as 1629 in England[16] and that had become "general" and "uniform" in the United States at least by 1876.[17]

Certainly, the increased mobility of the bar and the changing

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14. This Court granted certiorari from the equally divided Court of Appeals and heard argument on October 31, 1984.

15. Black's Law Dictionary, at p. 1363 (rev. 4th ed. 1968).

16. *Cooper v. Hutchinson*, 184 F.2d 119, 122 (3d Cir. 1950), *citing Thursby v. Warren*, 4 Car. 1, 19 Eng. Rep. 738 (C.P. 1629). *See* 6 Holdsworth, *A History of English Law* 435-436, 453, 456-457 (1924); Merrifield, *The Law of Attornies*, 41-44 (1830).

17. *Cooper, supra*, 184 F.2d at 122, *citing In re Mosness*, 39 Wis. 509, 20 Am. Rep. 55 (1876). *See* 1 Thornton, *A Treatise on Attornies at Law* §22 (1914); Brakel, S.J. & Loh, W.D., *Regulating the Multistate Practice of Law*, 50 Wash. L. Rev. 699, 702 (1975); Note, *Attorneys: Interstate and Federal Practice*, 80 Harv. L. Rev. 1711, 1717-1721 (1967-68).

character of the practice, noted recently by many courts,[18] is more readily and surely thwarted by the erection of residency requirements for *pro hac vice* admissions than by making residence a qualification for permanent admissions.

Nor can it be said that because the rules for *pro hac vice* admission uniformly provide that the decisions to grant or deny such motions are to be made "at the discretion of the court"[19] that, therefore, the discretion so bestowed is unbounded; subject to no restraints; may be abused or exercised arbitrarily; and is unreviewable. To say that, it is submitted, is the same as to say that the court rules may provide that motions for admission *pro hac vice* may be denied for no reason or for reasons which are unconstitutional. The court rules do not so provide. Once the exercise of power delegated to a court is prescribed as discretionary, the exercise of the power has been modified in some degree and, certainly, at least, then, it cannot be said that the power may be exercised indiscriminately. Courts have been granting and denying motions for admission *pro hac vice* with just such a view of the extent of their power. *See, e.g., Ross v. Reda*, 510 F.2d 1172, 1173 (6th Cir.), *cert. denied*, 423 U.S. 892 (1975): "The prerogative of a trial judge to exclude out-of-state counsel . . . is not an absolute right." (affirming denial by trial court of motion by out-of-state attorney who refused to limit his out-of-court remarks about the case); *State v. Ross*, 36 Ohio App. 2d 185, 188, 304 N.E. 2d 396, 399 (1973), *cert. denied*, 415 U.S. 904 (1974): "Whether or not so to specially permit an attorney not admitted to practice in Ohio . . . to represent a party in a particular action is a matter lying within the sound discretion of the court. Thus we must determine whether there has been an abuse of discretion"; *Enquire Printing and Publishing Co. v. O'Reilly*, 193 Conn. 370,

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18. *See, e.g., Leis v. Flynt*, 439 U.S. 438, 442 (1978); *Piper v. Supreme Court of New Hampshire, supra*, 723 F.2d at 117; *Enquire Printing and Publishing Co. v. O'Reilly*, 193 Conn. 370, 374, 477 A.2d 648, 651 (1984).

19. *See, e.g.*, N.J. Ct. R. R. 1:21-2.

373, 477 A.2d 648, 650 (1984): "Although the court receiving an application for admission pro hac vice has broad discretionary power, the exercise of that power is not unfettered. Our federal and state constitutions prohibit requiring applicants . . . to possess qualifications that have no 'rational connection with the applicant's fitness or capacity to practice law.' " (affirming trial court's denial of motion where it was likely out-of-state attorney-applicant would be a witness at the trial).

Furthermore, any "evils" which may be imputed to attend the admission of nonresidents to the bar for all purposes must necessarily be much reduced where nonresidents seek admission only for "one particular case." By the same token, if there is any evil involved in either case, the difficulty of dealing with it is much reduced when the request is only for one particular case.

The "evils" most commonly raised by those who have opposed applications for admission *pro hac vice*[20] are:

(1) The out-of-state lawyer is unfamiliar with local rules and practice. The answer to this is that an out-of-state lawyer, *e.g.*, a Philadelphia lawyer, is no less familiar with Camden's local nuances than is a licensed New Jersey attorney who lives and practices in Jersey City or Atlantic City or Sea Isle City or indeed than a licensed New Jersey attorney who lives in Camden but

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20. In this case, FitzPatrick's motion for admission *pro hac vice* was not opposed and respondents have put nothing in the record relating to any "evil" supposedly attendant to his admission or the admission of others like him. *See, In re Griffiths, supra*, 413 U.S. at 726-27 where this Court struck down the state's discriminatory rule relating to aliens' admission to practice law because "In sum, the (bar committee) simply has not established that it must exclude all aliens from the practice of law in order to vindicate its undoubted interest in high professional standards." (footnote omitted). What follows, therefore, is simply a demonstration that no possible evils accompany the admission *pro hac vice* of a fit and capable attorney; or, if they do, they are much more easily dealt with than those that might be said to attend admissions to the bar.

practices in Philadelphia.[21] In *pro hac vice* cases this is no problem at all because counsel is required to be associated with local counsel.

(2) The out-of-state lawyer will not be as interested in maintaining a good reputation or be amenable to discipline in the New Jersey courts. The answer to this is: (a) there is no correlation between a desire for a good reputation and in-state residence,[22] moreover, the good reputation of an attorney is more likely to depend on "where an individual's heart is rather than where her house is";[23] (b) there are many ways to insure the out-of-state attorney is subject to any necessary discipline[24] all of which are much less drastic than across the board exclusion;[25] but (c), in the case of a lawyer practicing by virtue of a *pro hac vice* admission, at all times he is before the court, under its scrutiny and subject to immediate, on the spot discipline.

(3) The out-of-state lawyer will not be available for court proceedings. The answer to this is: (a) "[a]vailability for court proceedings depends on geographical distance, not jurisdictional boundaries;"[26] obviously a lawyer in Philadelphia is more easily

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21. *See, e.g., Stalland, supra,* at 159-60; *Piper v. Supreme Court of New Hampshire,* 539 F. Supp. 1064, 1072 (1982); *In re Sackman, supra,* at 1019.

22. *Noll v. Alaska Bar Association,* 649 P.2d 241, 246 (Alaska 1982).

23. *Piper v. Supreme Court of New Hampshire,* 539 F. Supp. 1064, 1072 (D.N.H. 1982).

24. In the present case it might be considered that the chances for discipline being necessary are diminished in view of the court's finding that it has "absolutely no doubt" as to FitzPatrick's good standing.

25. *See, e.g., Piper,* 723 F.2d at 117; *Stalland, supra,* at 160-61; *Noll, supra,* at 246.

26. *Piper v. Supreme Court of New Hampshire, supra,* 539 F. Supp. at 1072.

available for court in Camden than is a lawyer from New Brunswick or even Egg Harbor;[27] finally, (b) in a *pro hac vice* case the additional appearance of local counsel is required which is not true where admitted attorneys from distant New Jersey points are in the case.

The Supreme Court of New Jersey recently had occasion to express its ideas regarding these three subjects of competence, accountability and accessibility in the course of considering its rule requiring nonresident applicants for admission to the bar to have their principal office in New Jersey. Though the case thus did not involve requirements for *pro hac vice* admissions, the court's observations are no less highly pertinent. In *In re Sackman*, 90 N.J. 521, 448 A.2d 1014 (1982), the court said:

> The premise behind the distinction is that the mere fact of *living* in New Jersey makes it more likely, and more to the point, sufficiently more likely, that that lawyer will be more competent, accessible and accountable than the one who is living in another state. If it is true, then it is only marginally true. We do not know whether the lawyer in Camden or Philadelphia reads the New Jersey Law Journal, the advance sheets, or goes to continuing legal education courses. We do not know which one regularly responds to telephone calls, and which will respond to calls at home. We do not know which one comes to the office, whether principal, bona fide or any office, regularly, and works hard. We know that some New Jersey lawyers are not up to date on New Jersey law and

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27. In *Noll*, *supra*, 649 P.2d at 245, the Supreme Court of Alaska observed: "[W]e fail to see how the asserted problem of communication between resident and nonresident counsel differs materially from that confronting a Fairbanks attorney trying a case in Juneau."

procedure, that some handle cases in areas for which they are ill-equipped, that some have more than one office in New Jersey and cannot be found when needed, in short, we know that all of the problems attributed to non-residents that might require them to have a principal office in New Jersey may be caused also by New Jersey attorneys.The differential in risk to clients concerning the competence, accessibility and accountability of the out-of-state lawyers as compared to the New Jersey resident seems to us insufficient to warrant a difference in these requirements.

While our experience with out-of-state attorneys cannot prove very much, since the rule has always required at least a principal office here, we note that complaints of incompetence, inaccessibility or unaccountability made of out-of-state attorneys appear to have no more frequency in relation to their total number than those against domiciliaries. There is absolutely no showing that New Jersey domiciliaries who have their principal office elsewhere, indeed almost their exclusive office elsewhere, are less competent, accessible or accountable when they practice in New Jersey at their "bona fide" office than are other New Jersey lawyers. And finally, though many states in the Union allow non-domiciliaries to practice without any "principal office" requirement, there is absolutely no literature, no statistical proof of which we are aware, not even a suggestion, that they constitute any risk to the public greater than that which emanates from the resident bar.

> The record is thus barren of proof of the difference in risk. Our own knowledge and experience suggest that while residence may be *a* factor bearing on competence, accessibility and accountability, it is not an important factor, and that relying on it may cause more disadvantages to the public than advantages.

Id. at 533-34, 448 A. 2d at 1021 (emphasis in original). As pointed out above any putative disadvantage is measurably diminished in the case of *pro hac vice* admissions because of the concomitant control which courts have over those lawyers whose admission is but "for one particular case."

Finally, it is submitted that *Leis v. Flynt*, 439 U.S. 438 (1979) does not control this case. That case held that admission *pro hac vice* is not a right protected by the Due Process Clause. Article IV, §2 was not mentioned in the Court's opinion or in the petition for the writ or in the respondent's brief. Whether the practice of law, *pro hac vice* or otherwise, is entitled to Privileges and Immunities Clause protection under the tests set out in *Toomer v. Witsell*, *supra* and *Hicklin v. Orbeck*, *supra*, was not considered. It is submitted that this is a question of pervasive importance. This Court recently granted a writ in the case of *Piper v. Supreme Court of New Hampshire*, 104 S. Ct. 2149 (1984) where discriminatory residency requirements for admission to the bar are involved. It was there argued, as here, that such requirements violated Article IV, §2 of the United States Constitution. It is submitted that the interests at stake when admissions *pro hac vice* are sought are no less important. For this reason the writ should be granted.

CONCLUSION

The interests of out-of-state lawyers in practicing their profession in New Jersey is entitled to the protection of the Privileges and Immunities Clause of the United States Constitution. That interest is entitled to no less protection than that which this Court held that clause afforded nonresident shrimpers to shrimp in South Carolina or nonresident pipeline workers to work in Alaska.

Likewise, the interest of out-of-state lawyers in practicing in New Jersey is protected by the Equal Protection Clause of the Fourteenth Amendment. That interest is entitled to no less protection than that which this Court held that clause afforded a Dutch citizen to practice law in Connecticut.

Finally, the interest of out-of-state lawyers to admission *pro hac vice* in New Jersey is no less important than their interest in admission to the bar of New Jersey the Court recently granted a writ in a case where a nonresident of New Hampshire was denied admission to the bar of that state. Granting a writ in this case is as well justified.

Respectfully submitted,

MARCY B. TANKER

LIEBERT, SHORT,
FITZPATRICK & LAVIN
Attorneys for Petitioner

ORDER DATED SEPTEMBER 21, 1984 OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5105

HENRY B. FITZPATRICK

v.

I.V. DiMARTINO, A.J.S.C., In His Capacity as Judge of the Superior Court, Law Division, Gloucester County, NJ and THE SUPERIOR COURT, Law Division, Gloucester County, NJ, Henry B. FitzPatrick, Jr.,

Appellant

Appeal from the United States District Court for the District of New Jersey
(D.C. Civ. No. 83-2102)
District Judge: Honorable John W. Bissell

Submitted Under Third Circuit Rule 12(6)
September 11, 1984

Before: ADAMS, HIGGINBOTHAM and SLOVITER, *Circuit Judges.*

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Order

Costs taxed against appellant.

BY THE COURT,

s/ Alan Higginbotham
Circuit Judge

Attest:

s/ Sally Mrvos Clerk
DATED: SEP. 21, 1984

LETTER-OPINION DATED JANUARY 31, 1984, UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of
John W. Bissell
Judge

Federal Building
Trenton, New Jersey 08605
January 31, 1984.

NOT FOR PUBLICATION

Filed Feb. 1, 1984
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Letter-Opinion

Re: HENRY B. FITZPATRICK, JR., etc. v. I.V. DiMARTINO, A.J.S.C., etc. and THE SUPERIOR COURT, etc.; Civil Action No. 83-2102.

Mesdames and Messieurs:

The case at bar arises out of a complaint filed by plaintiff on June 3, 1983 for declaratory and injunctive relief. The plaintiff, Henry B. Fitzpatrick, an attorney licensed by the Commonwealth of Pennsylvania, is suing the Superior Court of New Jersey and the Honorable I.V. DiMartino, the Assignment Judge of that Court in Gloucester and Camden Counties, for failure to grant plaintiff admission *pro hac vice.* Plaintiff desired to serve as counsel to Richard Coleman in a medical malpractice matter, *Coleman v. Gorin,* L-44136-81, presently pending in that state court. That action was filed in April 1982. On May 1, 1982, Diana B. Gittleman, Esquire, moved before the defendant, pursuant to New Jersey Court Rule 1:21-2, to admit Henry B. Fitzpatrick, Esquire, *pro hac vice,* as additional counsel. In support of the motion, plaintiff asserted his experience of twenty-five years in personal injury cases, his alleged "confidential" relationship with Coleman, and the fact that Coleman's treating physician and expert witness were both located in Pennsylvania. Judge DiMartino, relying on *Burlington County International Medical Association v. American Medicorp.,* 168 N.J. Super. 382 (Ch. Div.- 1979), denied Fitzpatrick's petition for admission. He concluded that Fitzpatrick had failed to establish good cause for admission *pro hac vice.* On June 22, 1982, plaintiff moved to appeal Judge DiMartino's ruling, pursuant to New Jersey Court Rule 2:2-4. In addition to claiming abuse of discretion, it was asserted that the Court had abrogated "[t]he due process rights of plaintiff (Coleman) and Henry B. Fitzpatrick, Jr. . . . by fail[ing] to reasonably or meaningfully apply the standards for *pro hac vice*

admission." [Defendant's Brief at p. 3.] Plaintiff alleged that the New Jersey Court Rule 1:21-2 and judicial interpretation created a reasonable expectation and thereby a protectable interest under the Fourteenth Amendment and the Privileges and Immunities Clause of the United States Constitution. The Appellate Division denied plaintiff's appeal in an Order dated July 12, 1982. Plaintiff then sought to appeal the Interlocutory Order of the Appellate Division to the New Jersey Supreme Court; however, this motion was also denied by an Order dated October 26, 1982. Accordingly, plaintiff presently seeks review of the ruling of Judge DiMartino and a declaratory judgment that the denial of plaintiff's admission *pro hac vice* in the absence of a specific finding that he is unfit or justifiable reason for exclusion, constitutes a violation of his rights under Article IV §2 and the Fourteenth Amendment of the Constitution of the United States.

Defendants oppose plaintiff's contentions and presently move, under *Fed.R.Civ.P.* 12(b)(6), for dismissal of plaintiff's complaint based upon *Leis v. Flynt,* 439 U.S. 438 (1979). In that case the Supreme Court granted certiorari and reversed the judgment of the Court of Appeals, holding that where *pro hac vice* admission is in the discretion of the trial court there exists no enforceable claim of entitlement under the Due Process Clause of the Fourteenth Amendment, nor is any federal constitutional interest implicated under the Privileges and Immunities Clause or any other provision of the United States Constitution.

Plaintiff has filed no responsive brief in the present matter. In fact, Ms. Tanker has advised the Court, by letter dated December 12, 1983, that in light of *Leis v. Flynt,* she "believe[s] that defendants' Motion should be granted and . . . [does] not intend to file a brief in opposition thereto." A review of the Supreme Court Opinion in *Leis* clearly demonstrates that plaintiff

may not maintain his purported claims asserted in this action. Accordingly, defendants' motion to dismiss the complaint shall be granted. A copy of an Order entered today reflecting this decision is enclosed.

Very truly yours,

s/ JOHN W. BISSELL
UNITED STATES DISTRICT
JUDGE

JWB/ebj
Enclosure (copy of Order)

Letter-Opinion

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action 83-2102

(HONORABLE JOHN W. BISSELL)

HENRY FITZPATRICK,

Plaintiff,

v.

I.V. DI MARTINO, A.J.S.C., etc., et al.

Defendants.

This matter having been opened to the Court by defendants' motion to dismiss the complaint pursuant to Fed. R. Civ. Proc. 12(b)(1) and/or (6) and the Court having considered briefs and oral argument of counsel and good cause having been demonstrated.

IT IS on this 26th day of January, 1984,

ORDERED that defendants' motion to dismiss the complaint pursuant to Fed. R. Civ. Proc. 12(b)(6) be granted.

s/ JOHN W. BISSELL
U.S.D.C.J.

TRANSCRIPT OF HEARING DATED MAY 21, 1982

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION, GLOUCESTER CO.
DOCKET L-44136-81

RICHARD W. COLEMAN, et ux

vs.

ROY L. GORIN

May 21, 1982

Before: I.V. DiMARTINO, A.J.S.C.

Present: PRINCIPATO & HANIFEN, ESQ.,

By: DIANA B. GITTELMAN, ESQ.,
for the Plaintiffs

Reported by;
Harry J. Bateman, C.S.R.
Rm. 602 Court House,
Camden, N.J. 08101

[2] MS. GITTLEMAN: This is my motion, your Honor, to have Henry FitzPatrick of the law firm of Liebert, Short, FitzPatrick and Lavin of Philadelphia, Pennsylvania, be admitted pro hac vice. Mr. FitzPatrick is present in court if the Court wishes to address any questions or comments to him.

THE COURT: I don't. I want to hear what makes this case so unusual that counsel in New Jersey can't try it.

Transcript of Hearing

MS. GITTLEMAN: Your Honor, it is not a question of counsel in New Jersey not being competent to try the case. What makes this case so special is the relationship Mr. Coleman has evolved.

THE COURT: There is nothing before me to tell me what that relationship is.

MS. GITTELMAN: Well, I believe in my affidavit, your Honor, I stated they have had a relationship for some ten months.

THE COURT: Your affidavit merely indicates to me there has developed a relationship, a client-attorney relationship.

MS. GITTLEMAN: Yes, Your Honor. If I may expand on that at this time, perhaps I [3] can —

THE COURT: Just a minute.

All you say is that counsel, Mr. FitzPatrick, had established an attorney-client relationship with the plaintiff and has twenty-five years experience in medical malpractice litigation. I would assume anytime an attorney represents a client that he has established an attorney-client relationship.

MS. GITTELMAN: Yes, Your Honor, Perhaps my affidavit did not go into the heart of that relationship sufficiently.

THE COURT: Wouldn't that be hearsay? Shouldn't you have an affidavit from Mr. FitzPatrick or from the client?

MS. GITTELMAN: I have an affidavit from both of them, Your Honor. They, perhaps, do not sufficiently go into the nature of the relationship.

Transcript of Hearing

THE COURT: They don't tell me anything about it. Mr. Coleman merely tells me in his affidavit that he requests that the Court permit Mr. FitzPatrick to represent him, period.

Mr. FitzPatrick tells me about his expertise, which I do not doubt in the least, [4] and that he is a member of the Trial Lawyers Association, period. He just tells me about himself.

MS. GITTELMAN: Well, Your Honor, for that reason, I did bring Mr. FitzPatrick with me today if the Court wishes to hear from him.

THE COURT: Just tell me what the special relationship is.

MS. GITTELMAN: Well, Your Honor, Mr. Coleman initially contacted Mr. FitzPatrick to represent him in this matter and as a result of that initial contact, Mr. FitzPatrick has been very instrumental in obtaining medical treatment which Mr. Coleman otherwise would not have been in a position to know about. Mr. FitzPatrick has found one of the two specialists in the entire country who is familiar with the treatment of this specific type of injury, an affliction from which Mr. Coleman suffers and he has arranged for Mr. Coleman to be treated by this doctor at the University of Pennsylvania Hospital, and through his very intimate participation in Mr. Coleman's medical care, I believe a very close relationship has developed between the two individuals, and Mr. Coleman, and, again, this is [5] hearsay, has indicated —

THE COURT: I will accept your hearsay statement.

MS. GITTELMAN: That his relationship is more than that of an attorney-client. It goes to the very nature of his physical well-being and prognosis. He feels Mr. FitzPatrick has salvaged

what has been very diastrous [sic] medically and led him to the opportunity to get some possible way — that he could possibly turn his condition around, but that hasn't been indicated clearly. He has established contact with Mr. Coleman and the specialist in Philadelphia, and visited with him on numerous occasions in receiving corrective therapy at the University of Pennsylvania Hospital.

THE COURT: I fail to see what all that has to do with who tries the case.

MS. GITTELMAN: It has to do with Mr. Coleman's confidence in Mr. FitzPatrick and a close relationship.

THE COURT: I accept the fact that Mr. Coleman has confidence in Mr. FitzPatrick. Aren't there other criteria to be established before we can permit outside counsel to try a [6] case here in Camden County?

MS. GITTELMAN: Well, Your Honor, I think the criteria has been established in the papers which I have submitted. Mr. FitzPatrick is a member in good standing of the Bar of Pennsylvania. I would also note he had on one occasion made an appearance some years ago in the State of New Jersey. He has not appeared pro hac vice within the past several years. I believe, although I am aware the matter is in the Court's discretion, I believe the situation warrants his admission.

THE COURT: Anything else you want to say?

MS. GITTELMAN: No.

THE COURT: Do you want to say something, Mr. FitzPatrick?

MR. FITZPATRICK: Yes, I would, if I might.

THE COURT: All right.

MR. FITZPATRICK: What Ms. Gittelman is saying, is that Mr. Coleman has had a history, it is almost unbelievable, his medical history for the last twenty years, since he was twenty years old. He had a serious fracture of his leg, [7] and he has spent literally years in body casts. He has had treatments by doctors all over the world. He had this incident that occurred with respect to treatment he got in Williamstown. He came to me and I think Mr. Coleman feels I have taken up his cause because he found somebody that he can place trust in and place himself in. I have obtained treatment for Mr. Coleman in the University of Pennsylvania Hospital. All these things Ms. Gittelman has mentioned.

I think, really, Your Honor, the most important thing is that I just don't think another new face would be good for Mr. Coleman. There is no question there are competent attorneys in Camden County or Gloucester, New Jersey, to handle this case. There is no question about that. We make no such assertion. I just feel for Mr. Coleman's well-being in this case I would be better to represent him than anybody else.

Now, we are going to have counsel sitting along with us in this trial.

THE COURT: That is mandatory, sir.

MR. FITZPATRICK: No question about it, Your Honor. I just don't feel there is any [8] affront to the Court System of New Jersey. None is intended. I have been practicing across the

river, Your Honor, for twenty-six years now. I have only been in this building once and that is the only time I have had a case in New Jersey. We sent many, many cases here to Camden County, Gloucester County, Burlington County lawyers. There is no question they are competent to handle the cases. I would just request, Your Honor, in the exercise of its discretion, to grant this request in this particular matter.

THE COURT: I am concerned about changing precedent. I have been the Assignment Judge of Camden County for about eight months. I have only allowed the admission pro hac vice once, and even that case I would not have allowed it had my predecessor not already verbally ruled that application should be granted. I felt obligated in that case not to demean the integrity of my predecessor by overruling him, even though no official order was entered. The application has to be based on a lot of distinguishing factors. First of all, and I believe you may have read the decision written by my colleague, Judge Haines, who is now the [9] Assignment Judge in Burlington County, in the case of Burlington Co. Internal Medicine Associates vs. American Medicorp which appears at 168 New Jersey, Super 362. He indicates there must be evidence before the Court that foreign counsel is of good standing in his own state. I have absolutely no doubt of that in this case. The opinion also indicates foreign counsel by affidavit should indicate that he has maintained his competency as an attorney particularly in any specialization which he claims, and I am completely satisfied that is so here. There must be an indication by the client that he wishes to be represented by the foreign attorney, and that is certainly true here. However, there also has to be shown good cause showing that the case involves a complexed field of law, and no one here is going to in anyway imply to me, nor can I accept that a medical malpractice case is foreign to the intelligence and competency of local counsel. We try these cases in this court house daily in large numbers.

There also has to be shown a long-held attorney-client relationship, I don't see any such relationship here. There is a relationship [10] that arises out of this case. The case that Judge Haines decided was a case where the attorney had represented this company for a number of years, did all their work. This relationship — that is why I specifically asked you what the relationship was — this relationship is only by virtue of this case, not by virtue of any longstanding relationship between counsel and his client.

Even more importantly, the next item, there must be shown a lack of local counsel with expertise in the field involved. I have already indicated, as a matter of fact, I consider your firm very competent. There are attorneys in this county and Gloucester County who try medical malpractice cases on a daily basis, very difficult ones. I don't see anything complexed about this case that New Jersey counsel cannot handle. There may be legal questions involving rules of foreign jurisdiction, but that is not here.

Lastly, there exists a need for extensive discovery proceedings in foreign jurisdictions. I recognize a lot of the medical has to come out of Pennsylvania, but Pennslyvania [11] is across the river. We are not talking about going to California or Chicago. After weighing all the pros and cons, I just do not feel this is the appropriate case for counsel from a foreign jurisdiction should be permitted to try this case.

The application is denied.

Transcript of Hearing

CERTIFICATION

I, HARRY J. BATEMAN, Notary Public of the State of New Jersey, hereby certify that the foregoing is a true and correct transcript from my original stenographic notes taken by me in the captioned matter.

s/ Harry J. Bateman
Harry J. Bateman, C.S.R.
Notary Public

COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION AND DECLARATORY JUDGMENT

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GARY CUTLER, ESQUIRE

Attorney for Plaintiff

Mainline Shopping Center
Florelle Plaza
Cinnaminson, NJ 08077
(609) 829-9094

HENRY B. FITZPATRICK, JR.
1200 One Franklin Plaza
Philadelphia, PA 19103

v.

I. V. DiMARTINO, A.J.S.C.
In His Capacity as Judge of the Superior Court, Law Division
Gloucester County, New Jersey
1 North Board Street
Woodbury, NJ 08096

and

THE SUPERIOR COURT
Law Division
Gloucester County, New Jersey
1 North Broad Street
Woodbury, NJ 08096

Complaint

COUNT I

JURISDICTION

1. This is a civil action in which original jurisdiction is vested in this Court by virtue of Article III, Section 2, of the Constitution of the United States, 28 U.S.C. §1343(3) and 1343(4), and 42 U.S.C. §1983. Plaintiff prays that a preliminary and permanent injunction issue to restrain defendants from acting under color of state law, custom and usage to deprive plaintiff of rights secured to him by the Constitution and the Laws of the United States and plaintiff prays for a declaratory judgment of the rights secured to him by the Constitution and the Laws of the United States. The right to injunctive relief is founded on Rule 65 of the Federal Rules of Civil Procedure and 28 U.S.C. §2201 and §2202.

PARTIES

2. Plaintiff, Henry B. FitzPatrick, Jr., is a resident of the Commonwealth of Pennsylvania and is licensed to practice law in the Commonwealth of Pennsylvania, and is a member in good standing of the Bar.

3. The Honorable I. V. DiMartino is named a defendant in his capacity as Judge of the Superior Court, Law Division, Gloucester County, New Jersey. He presided over the hearing on a motion to permit the admission before the Court, *pro hac vice*, of Henry B. FitzPatrick, Jr., Esquire, as additional counsel for Richard W. Coleman in proceedings captioned *Richard W. Coleman, et al. v. Roy L. Gorin*, Docket No. L-44136-81 of said Court.

4. The Superior Court, Law Division, Gloucester County, New Jersey, is named as defendant in its capacity as a court

established and authorized by the laws of the State of New Jersey to exercise jurdisdiction over proceedings captioned *Richard W. Coleman, et al. v. Roy L. Gorin,* Docket No. L-44136-81.

SUMMARY OF THE COMPLAINT

5. This is an action under, *inter alia*, §1983 of Title 42 of the United States Code. The Complaint seeks a judgment declaring the rights of plaintiff attorney FitzPatrick to represent one Richard W. Coleman as additional counsel in civil proceedings captioned *Richard W. Coleman, et al. v. Roy L. Gorin*, Docket No. L-44136-81, based upon the absence of a specific finding pursuant to a hearing that plaintiff FitzPatrick is unfit or that substantial reasons exist that would justify his exclusion.

6. The plaintiff further seeks a judgment granting a preliminary and permanent injunction compelling defendants to admit him *pro hac vice* for purposes of representing Richard W. Coleman in civil proceedings captioned *Richard W. Coleman, et al. v. Roy L. Gorin*, Docket No. L-44136-81, based upon the absence of a specific finding pursuant to a hearing that he is unfit or that substantial reasons exist which would justify his exclusion on the grounds that to do otherwise would amount to a deprivation of his constitutional rights under color of state law.

HISTORY OF PROCEEDINGS

7. On or about May 7, 1981, a Complaint captioned *Richard W. Coleman, et al. v. Roy L. Gorin*, was filed in the Superior Court of New Jersey, Law Division, Gloucester County, New Jersey, Docket No. L-44136-81, by Diana B. Gittleman, Esquire, a member of the Bar of the State of New Jersey. Said Complaint alleges that the defendant's medical malpractice caused plaintiff serious injury.

Complaint

8. Shortly prior to May 21, 1982, Diana B. Gittleman, Esquire, moved for an Order permitting the admission before the Court, *pro hac vice*, of plaintiff, attorney FitzPatrick, as additional counel for Richard W. Coleman.

9. On May 21, 1982, a hearing on the Motion was held before defendant DiMartino. Affidavits were presented and testimony of Diana B. Gittleman, Esquire, and plaintiff FitzPatrick were heard. Defendant DiMartino stated as follows:

> "The Court: I am concerned about changing precedent. I have been the Assignment Judge of Camden County for about eight months. I have only allowed the admission *pro hac vice* once, and even that case I would not have allowed it had my predecessor not already verbally ruled that application should be granted." (Hearing transcript, p. 8). (Defendant DiMartino is also the Assignment Judge for Gloucester County.)

10. Defendant DiMartino stated that his action under N.J. Court Rules, 1969, R.1:21-2 was governed by the case of *Burlington County Internal Medicine Associates, P.A. v. American Medicorp, Inc.*, 168 N.J. Super. 382, 403 A.2d 43 (Chan. 1979). (Hearing transcript p. 9).

11. Paraphrasing that case, Defendant DiMartino listed those things which a non-resident of New Jersey *must* establish in order to be permitted to appear for his client in a New Jersey Court:

> "He [the Judge who wrote the Burlington County opinion] indicates there must be evidence before the court that foreign counsel is of good standing

in his own state. I have absolutely no doubt of that in this case."

"The opinion also indicates foreign counsel by affidavit should indicate that he has maintained his competency as an attorney particularly in any specialization which he claims, and I am completely satisfied that is so here."

"However, there also has to be shown good cause showing that the case involves a complex field of law, and no one here is going to in any way imply to me, nor can I accept that a medical malpractice case is foreign to the intelligence and competency of local counsel."

"There also has to be shown a longheld attorney-client relationship. I don't see any such relationship here. There is a relationship that arises out of this case. The case that Judge Haines decided [the *Burlington County* case] was a case where the attorney had represented this company for a number of years, did all their work."

"Even more importantly, the next item, there must be shown a lack of local counsel with expertise in the field involved. I have already indicated, as a matter of fact, I consider your firm very competent . . . I don't see anything complexed [sic] about this case that New Jersey counsel cannot handle." (Hearing transcript p. 9, 10).

Defendant DiMartino denied the Motion at the hearing and in a written Order dated June 7, 1982.

Complaint

12. On June 22, 1982, Diana B. Gittleman, Esquire, filed a Motion for Leave to Appeal Interlocutory Order in the Superior Court, Appellate Division, which Motion was assigned Docket No. AM-925-81T1, Motion No. M-4160-81.

13. On July 12, 1982, the Motion was denied by the Honorable Theodore I. Botter, Presiding Judge of Part I, Superior Court of New Jersey, Appellate Division.

14. On July 28, 1982, Gary B. Cutler, Esquire, having been substituted for Diana B. Gittleman, Esquire, filed a Motion for Leave to Appeal Interlocutory Order in the Supreme Court of New Jersey, which Motion was designated M-159 September Term, 1982, No. 20224.

15. On October 26, 1982, the Supreme Court of New Jersey issued an Order denying the Motion.

LAWYER-CLIENT RELATIONSHIP

16. The relationship between plaintiff FitzPatrick and Richard W. Coleman is unique in that FitzPatrick is not only involved with the legal aspects of the civil proceedings, but is involved with and was instrumental in obtaining medical treatment for Coleman's very severe injury.

17. It was through the efforts of FitzPatrick that Coleman is now being treated by a physician at the Hospital of the University of Pennsylvania who is one of only two physicians in the United States specializing in the electrical stimulation of bone growth.

18. The nature of the relationship is such that Coleman has particular trust and confidence in FitzPatrick and desires FitzPatrick to represent him.

19. The nature of the relationship was presented to defendant DiMartino at the hearing of May 21, 1982.

QUALIFICATIONS OF HENRY B. FITZPATRICK, JR.

20. The plaintiff, Henry B. FitzPatrick, Jr., is a graduate of the University of Pennsylvania Law School from where he received an LL.B. in 1956 and served as Editor of the Law Review. He was admitted to the Bar of the Commonwealth of Pennsylvania in 1957.

21. The plaintiff, FitzPatrick, has been admitted and is a member in good standing of the following Courts: United States Court of Appeals for the Third Circuit, United States District Court for the Eastern District of Pennsylvania, United States District Court for the Middle District of Pennsylvania, the Supreme Court of Pennsylvania, the Superior Court of Pennsylvania, and the Commonwealth Court of Pennsylvania.

22. The plaintiff, FitzPatrick, has been admitted *pro hac vice* and tried and argued cases in the following Federal Courts: United States District Court for the Northern District of Illinois, United States District Court for the District of Maryland, United States District Court for the District of Delaware, United States District Court for the District of Columbia, and United States District Court for the District of New Jersey.

23. The plaintiff, FitzPatrick, has been admitted *pro hac vice* and tried and argued cases in State courts in the following states: Delaware, Maryland, New York and New Jersey.

24. The plaintiff FitzPatrick is a member in good standing of the following associations: American Trial Lawyers Association,

Pennsylvania Trial Lawyers Association, Philadelphia Trial Lawyers Association, American Bar Association, Pennsylvania Bar Association and Philadelphia Bar Association.

VIOLATION OF PLAINTIFF'S RIGHTS

25. The refusal to permit plaintiff FitzPatrick to be admitted *pro hac vice* in the absence of a specific finding that he is unfit or that substantial reasons exist which would justify his exclusion constitutes a violation of his rights under Article IV, §2 of the United States Constitution (the Privileges and Immunities Clause), and under the Fourteenth Amendment to the United States Constitution.

26. In addition, upon information and belief, other out-of-state counsel, equally and similarly situated, and under equal and similar circumstances as those presented here, are and have been admitted *pro hac vice* by various judges of the Superior Court of New Jersey.

27. The conduct of the defendants herein committed under color of state law violates, *inter alia*, the plaintiff's rights to due process and equal protection, as well as his rights to maintain a lawyer-client relationship, to freely engage in his chosen profession, and to be unrestricted in travel for such purposes.

28. Plaintiff has exhausted all available state remedies and has no adequate remedy at law available to him.

WHEREFORE, Henry B. FitzPatrick, Jr., respectfully demands judgment against the defendants for the following relief:

Complaint

1) For an Order directing that the civil proceedings captioned *Richard W. Coleman, et al. v. Roy L. Gorin*, Docket No. L-44136-81 in the Superior Court of New Jersey, Law Division, Gloucester County, are stayed until such time as the instant action is finally determined.

2) For a judgment declaring the refusal to permit his admission *pro hac vice* in the absence of a specific finding that he is unfit or that substantial reasons exist which would justify his exclusion constituties a violation of his rights under Article IV §2 of the United States Constitution and under the Fourteenth Amendment to the United States Constitution; and

3) For a preliminary and permanent injunction enjoining the defendants from preventing his admission *pro hac vice* as additional counsel for Richard W. Coleman in the civil proceedings captioned *Richard W. Coleman, et al. v. Roy L. Gorin*, Docket No. L-44136-81; and

4) For such other and further relief as the Court shall deem appropriate, together with costs and disbursements of this action.

s/Gary B. Cutler
GARY B. CUTLER, ESQUIRE
Attorney for Plaintiff

Complaint

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

GARY B. CUTLER, ESQUIRE

Attorney for Plaintiff

Mainline Shopping Center
Florelle Plaza
Cinnaminson, NJ 08077
(609) 829-9094

HENRY B. FITZPATRICK, JR.

v.

I.V. DiMARTINO, A.J.S.C.
In His Capacity as Judge of the Superior Court
Law Division
Gloucester County, NJ

and

THE SUPERIOR COURT
Law Division
Gloucester, NJ

CERTIFICATION OF SERVICE

I, Gary B. Cutler, Esquire, hereby certify that a copy of the Complaint for Preliminary and Permanent Injunction and Declaratory Judgment was mailed via Certified Mail, Receipt Requested, on May 2, 1983 to the following:

I. V. DiMartino, A.J.S.C.
In His Capacity as Judge of the Superior Court
Law Division

Complaint

Gloucester County, New Jersey
1 North Broad Street
Woodbury, NJ 08096

The Superior Court
Law Division
Gloucester County, New Jersey
1 North Broad Street
Woodbury, NJ 08096

s/Gary B. Cutler
GARY B. CUTLER, ESQUIRE
Attorney for Plaintiff,
Henry B. FitzPatrick, Jr.

MOTION FOR ADMISSION OF COUNSEL *PRO HAC VICE*

PRINCIPATO AND HANIFEN
519 Federal Street - Suite 304
Camden, New Jersey 08103
(609) 964-0405
Attorneys for Plaintiffs

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
GLOUCESTER COUNTY
DOCKET NO. L-44136-81

CIVIL ACTION

RICHARD W. COLEMAN, et al,

Plaintiffs,

VS.

ROY L. GORIN,

Defendant.

TO: Roy L. Gorin
Washington Medical Towers
Turnersville, NJ 08012

PLEASE TAKE NOTICE that on the 2lst day of May, 1982, the undersigned attorney for the plaintiff will move for an Order permitting the admission before this Court, pro hac vice, of Henry B. FitzPatrick, Jr., Esquire, as additional counsel for the plaintiff, pursuant to R.1:21-2 of the New Jersey Court Rules.

Motion for Admission of Counsel Pro Hac Vice

The plaintiff will rely on the attached Affidavits.

It is hereby requested that this Motion be submitted to the Court for ruling on the papers pursuant to R.1:6-2.

PRINCIPATO AND HANIFEN

BY: DIANA B. GITTELMAN
Attorneys for the Plaintiff

DATED: April 30, 1982

PRINCIPATO AND HANIFEN
519 Federal Street - Suite 304
Camden, New Jersey 08103
(609) 964-0405
Attorneys for Plaintiffs

Motion for Admission of Counsel Pro Hac Vice

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
GLOUCESTER COUNTY
DOCKET NO. L-44136-81

CIVIL ACTION

RICHARD W. COLEMAN, et al,

Plaintiffs,

VS.

ROY L. GORIN,

Defendant.

STATE OF NEW JERSEY :
: ss.:
COUNTY OF CAMDEN :

DIANA B. GITTELMAN, of full age, being duly sworn according to law, upon her oath deposes and says:

1. I am an attorney at law licensed to practice in the State of New Jersey and represent the plaintiff, RICHARD W. COLEMAN, in the above-captioned action. I am submitting this Affidavit in support of my Motion for Admission of Counsel *Pro Hac Vice.*

2. Good cause exists to admit Henry B. FitzPatrick, Jr., Esquire, of the firm of Liebert, Short, FitzPatrick, and Lavin, 1200 One Franklin Plaza, Philadelphia, Pennsylvania, as additional

counsel in this matter as Mr. FitzPatrick has an established attorney-client relationship with the plaintiff and has had 25 years experience in medical malpractice litigation. The plaintiff herein is currently recuperating from surgery which was performed at the University of Pennsylvania Hospital on the afflicted leg which is the subject matter of this litigation. Both his treating physicians, as well as those physicians who will be called as experts by the plaintiff, are located in Pennsylvania, necessitating the conduct of extensive discovery in that jurisdiction.

3. For the reasons aforesaid, it is respectfully requested that Henry B. FitzPatrick, Jr., Esquire, be admitted pro hac vice as additional counsel in the above-captioned action.

PRINCIPATO AND HANIFEN

BY: DIANA B. GITTELMAN

Sworn and Subscribed to
before me this 30th day
of April, 1982.

s/ Mary E. Scarduzio
Notary Public of New Jersey
My Commission Expires 3-26-84

Motion for Admission of Counsel Pro Hac Vice

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
GLOUCESTER COUNTY

RICHARD W. COLEMAN, et ux

Plaintiffs

vs.

ROY L. GORIN

Defendant

A F F I D A V I T

COMMONWEALTH OF PENNSYLVANIA :
SS
COUNTY OF PHILADELPHIA :

I, RICHARD W. COLEMAN, being duly sworn according to law depose and state that I am the plaintiff in the within action and I respectfully request that the Court permit Henry B. FitzPatrick, Jr., Esquire, of the law firm of Liebert, Short, FitzPatrick & Lavin, Philadelphia, Pennsylvania, to represent me in the New Jersey Court in the above captioned action.

s/ RICHARD W. COLEMAN

Sworn to and Subscribed:
Before me this 29th day:
Of April 1982:

s/ Deborah Short
NOTARY PUBLIC Phila., Phila. Co.
My Commission Expires Aug. 11, 1984

Motion for Admission of Counsel Pro Hac Vice

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

RICHARD W. COLEMAN, et ux

Plaintiffs

vs.

ROY L. GORIN,

Defendant

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA :
SS
COUNTY OF PHILADELPHIA :

HENRY B. FITZPATRICK, JR., ESQUIRE, being duly sworn according to law deposes and says that he has been a practicing lawyer specializing in the trial of personal injury cases for plaintiffs since 1957, including medical malpractice cases. The medical malpractice cases have included claims against orthopaedic surgeons, neurosurgeons, gynecologists, gastroenterologists, general surgeons, radiologists and dentists. Counsel is a member of the American Trial Lawyers Association, the Pennsylvania Trial Lawyers Association and the Philadelphia Trial Lawyers Association and has attended seminars on the trial of medical malpractice cases given by those associations.

s/ Henry B. Fitzpatrick, Jr.,
Esquire

Motion for Admission of Counsel Pro Hac Vice

Sworn to and Subscribed: Before me this 29th day:
Of April, 1982:
s/ Deborah Short
NOTARY PUBLIC
Phila., Phila. Co.
My Commission Expires Aug. 11, 1984

Motion for Admission of Counsel Pro Hac Vice

SUPREME COURT OF PENNSYLVANIA

know all men by these presents,

THAT Henry B. Fitzpatrick, Jr. was duly admitted to the Bar of the Commonwealth of Pennsylvania on the 15th day of April 1957, and is now a qualified member in good standing.

Witness my hand and official seal
this 26th day of April A.D. 1982

s/ Marlene Lachman
Prothonotary

NO. 84-

Office-Supreme Court, U.S.
FILED
JAN 24 1985
ALEXANDER L. STEVAS,
CLERK

84-1095

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HENRY B. FITZPATRICK, JR.,

Petitioner,

vs.

I.V. DiMARTINO, A.J.S.C., etc., and
THE SUPERIOR COURT, LAW DIVISION, etc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

IRWIN I. KIMMELMAN,
Attorney General of New Jersey,
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Of Counsel.

ANDREA M. SILKOWITZ
Deputy Attorney General,
On the Brief.

Adams Press Corp., 1188 Raymond Boulevard, Newark, New Jersey 07102—(201) 623-8611

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NO. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HENRY B. FITZPATRICK, JR.,

Petitioner,

vs.

I.V. DiMARTINO, A.J.S.C., etc., and
THE SUPERIOR COURT, LAW DIVISION, etc.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Counter-Statement of the Case

With the adoption of the 1947 State Constitution, the existing decentralized regulation of the legal profession in New Jersey was revamped to establish the Supreme

Court of New Jersey, the State's highest appellate Court, as the exclusive regulator of the practice of law in the State.* Thus, Article VI, §II par. 3 of the New Jersey Constitution provides that the Supreme Court of New Jersey,

> "shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts . . . [and] shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted."

As consistently interpreted by the Supreme Court of New Jersey, this constitutional provision empowers the Court to establish and supervise the obligations and conditions as to the practice of law from admission to disbarment and in "every area in which unjust or unethical conduct might afflict the public at the hands of those admitted by the Court to the practice of law." *American Trial Lawyers* v. *New Jersey Supreme Court,* 66 N.J. 258, 264, 300 A.2d 350, 353 (1974). See also *In the Matter of the Application of Philip J. LiVolsi,* 85 N.J. 576, 428 A.2d 1268 (1981), *State* v. *Rush, supra* at 410, 217 A.2d at 447.

In the exercise of its constitutionally delegated powers, the Supreme Court of New Jersey establishes the conditions for the plenary licensure of attorneys in the State. Prior to 1969, the rules promulgated by the Supreme Court of New Jersey precluded admission to the State bar of non-domiciliaries. Effective in 1969, however, the rule was amended to allow for the admission of attorneys

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* Prior to 1947, control over the admission of attorneys to the practice was fragmented with the former Supreme Court recommending and the Governor approving the licensing and admission of attorneys to practice in the State. *State* v. *Rush,* 46 N.J. 399, 411-412, 217 A.2d 441, 447 (1966).

residing out of state who maintained a principal law office in New Jersey. This provision was retained in a subsequent modification of the rule in 1978, requiring domiciliaries, as a condition of licensure, to henceforth establish a bona fide office in the State. See N.J. Ct. R. 1:21-1(a). Effective August, 1982, the rule was again amended in conformance with the Court's decision in *In re Sackman,* 90 N.J. 521, 448 A.2d 1014 (1982) to eliminate the principal-office requirement for non-domiciliary New Jersey licensed lawyers and to require for both domiliciary and non-domiciliary attorneys that they maintain a bona fide office in the State. Accordingly, a non-domiciliary attorney, who has satisfied all other requirements for licensure is permitted to practice in the State provided that he maintains a bona fide office in the State (as defined by the Court Rule) and appoints the Clerk of the Supreme Court as his agent for service of process. See N.J. Ct. R. 1:21-1(a).

The Court has also prescribed the conditions under which attorneys, who have not satisfied the aforestated requirements, might seek *pro hac vice* admission in the state courts. Effective in 1948, the Court adopted rules permiting unlicensed attorneys "of good standing" to be admitted "at the discretion of the Court in which any cause is pending, *pro hac vice,* . . . provided . . . that all pleadings, briefs and other papers filed with the Court shall be signed by an attorney of record authorized to practice in this State, who shall be responsible for them." See former N.J. Ct. R. 1:8-10(b) (1948) and former N.J. Ct. R. 1:12-2 (1953). The rule was amended in 1969 to permit *pro hac vice* appearances by employees of out-of-state professional corporations authorized to practice law in their own states and to make clear that the New Jersey attorney of record would be held accountable for the conduct of the lawyer appearing *pro hac vice.* See N.J. Ct. R. 1:21-2 (1969).

The rule was further amended in April 1975 to acknowledge that attorneys admitted to practice in New Jersey but no longer authorized to practice by reason of non-residence and the failure to maintain principle offices for the practice of law could seek admission *pro hac vice* under the same terms as other attorneys. Consistent with the 1978 amendment of N.J. Ct. R. 1:21-1(a), N.J. Ct. R. 1:21-2(a) was further amended effective January 10, 1979 to permit *pro hac vice* admission of resident attorneys who failed to maintain a bona fide office in the State. Most recently in September 1983 and February 1984, the rule has been amended by the Court to allow for resident or non-resident attorneys alike, who do not maintain a bona fide office for the practice of law within the State, as defined by N.J. Ct. R. 1:21-1(a), to seek permission to appear in a pending State Court matter "at the discretion of the Court" in which such matter is pending. In applying for *pro hac vice* admission those attorneys, whether domiciliaries or non-domiciliaries, must establish, *inter alia,* by affidavit or certification that good cause* exists for the granting of the motion.

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* The rule contemplates that good cause may be shown, by any of the following:

> "(i) the cause in which he seeks admission involves a complex field of law in which he is a specialist, or
>
> (ii) there has been an attorney-client relationshp with the client for an extended period of time, or
>
> (iii) there is a lack of local counsel with adequate expertise in the field involved, or
>
> (iv) the cause presents questions of law involving the law of the foreign jurisdiction in which the applicant is licensed, or

(Footnote continued on following page)

By the instant petition for certiorari, Henry B. Fitzpatrick, Jr., an attorney licensed by the State of Pennsylvania, but not authorized to practice law in the State of New Jersey, seeks review of the Order of the United States Court of Appeals for the Third Circuit, affirming the District Court's dismissal of Fitzpatrick's complaint filed pursuant to 42 U.S.C. §1983 against the Honorable I.V. DiMartino, Assignment Judge of the Superior Court of New Jersey, in response to Judge DiMartino's denial of Fitzpatrick's motion for *pro hac vice* admission in a State medical malpractice action (*Coleman* v. *Gorin*, Docket No. L-441 36-81). As detailed in the petition for certiorari, Fitzpatrick sought *pro hac vice* admission in this matter on the basis of his efforts in obtaining medical treatment for the plaintiff Coleman's injuries, which were the subject of the malpractice action (App. at 11a, 12a, 21a). Following a hearing on the motion, Judge DiMartino on May 21, 1982, rendered an oral opinion in which he concluded that Fitzpatrick had failed to establish any good cause for appointment of out-of-state counsel by reason of: 1) the complexity of the case for which he sought permission to join as counsel (App. at 13a); 2) the fact of a "long-held attorney-client relationship" (App. at 14a); 3) a lack of local counsel with expertise in the field involved (App. at 14a); or 4) the need for extensive dis-

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(Footnote continued from preceding page)

(v) there is need for extensive discovery or other proceedings in the foreign jurisdiction in which the applicant is licensed, or

(vi) such other reason as would present good cause for the pro hac vice admission."

[N.J. Ct. R. 1:21-2(a)(4)(i)-(vi)].

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covery in a jurisdiction at a great distance from New Jersey (App. at 14a).*

On June 22, 1983, Coleman moved pursuant to N.J. Ct. R. 2:2-4 for leave to appeal the April 21, 1982 decision of Judge DiMartino, which had been memorialized in an order dated June 7, 1982. In his brief Coleman urged *inter alia,* that the Court had abrogated "[t]he procedural due process rights of plaintiff [Coleman] and Henry B. Fitzpatrick, Jr. . . . by fail[ing] to reasonably or meaningfully apply the standards for *pro hac vice* admission" and had violated Fitzpatrick's rights under the Privilege and Immunities Clause of the United States Constitution. In an order dated July 12, 1982, the motion for leave to appeal was denied by the Appellate Division.** Thereafter,

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* As of the date of this motion, R. 1:21-2 provided in pertinent part that "[a]n attorney of any other jurisdiction of good standing there, . . . *may, at the discretion of the Court* in which any matter is pending, be permitted, *pro hac vice,* to speak in such matter in the same manner as an attorney of this State who is domiciled in and maintains a bona fide office for the practice of law in this State or maintains in this State his principal office for the practice of law; . . . provided, however, that all pleadings, briefs and other papers filed with the Court shall be signed by an attorney of record authorized to practice in this State, who shall be held responsible for them and for the conduct of the cause and of the admitted therein." (emphasis supplied).

The factors upon which Judge DiMartino based his determination were initially suggested in the *Burlington County Internal Medicine Association, PA.* v. *Amer. Medicorp,* 168 N.J. Super. 382, 403 A.2d 43 (Chan. Div. 1979) decision and later incorporated into the current Supreme Court Rule.

**N.J. Ct. R. 2:2-4 provides in pertinent part that ". . . The Appellate Division may grant leave to appeal from an interlocutory rule of a court, *in the interest of justice . . .*" (emphasis added). Compare N.J. Ct. R. 2:2-3(a)(1) (appeal as of right from final judgments of the Superior Court trial divisions).

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on or about July 28, 1982, Coleman filed with the Supreme Court of New Jersey a Notice of Motion for Leave to Appeal the Interlocutory Order of the Appellate Division (Da55 to Da60), in support of which Coleman filed a brief raising the identical federal constitutional issues raised before the Appellate Division. By order dated October 26, 1982, the motion was denied by the Supreme Court.* No further review of this decision was sought from this Court.

On June 3, 1983, Fitzpatrick filed a Complaint in the United States District Court for the District of New Jersey seeking a judgment declaring "[Judge Di Martino's] refusal to permit his admission *pro hac vice* in the absence of a specific finding that he is unfit or that substantial reasons exist which would justify his exclusion constitutes [sic] a violation of his rights under Article IV §2 of the United States Constitution and under the Fourteenth Amendment to the United States Constitution" and preliminary and permanent injunctive relief "enjoining the defendants from preventing his admission *pro hac vice* . . ." (App. at 24a). A timely answer was filed on August 18, 1983, asserting among the affirmative defenses the failure to state a cause of action and the court's lack of jurisdiction pursuant to 28 U.S.C. §1257 to collaterally review the decisions of the New Jersey State courts with regard to plaintiff's motion for *pro hac vice* admission.

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* N.J. Ct. R. 2:2-3(b) provides that "[a]ppeals may be taken to the Supreme Court by its leave from interlocutory orders:

* * *

(b) of the Appellate Division when necessary to prevent irreparable injury;

* * *

Defendants subsequently moved for an order granting summary judgment or in the alternative for dismissal of the complaint pursuant to Fed. R. Civ. Proc. 12(b)(1) or (6) based upon their primary contention that plaintiff's claims were foreclosed by this Court's ruling in *Leis* v. *Flynt,* 439 U.S. 438 (1979). As well defendants urged dismissal on the basis that the federal court action constituted an impermissible collateral challenge to a final State court decision thus depriving the Court of subject matter jurisdiction pursuant to 28 U.S.C. §1257 (c) and was otherwise barred by the doctrine of *res judicata.* In response thereto, plaintiff's counsel advised the Court, by letter dated December 12, 1983, that in view of *Leis* v. *Flynt,* she "believed that defendants' Motion should be granted . . ." and . . . did not intend to file a brief in opposition thereto." (App. at 5a). By order dated January 26, 1984, the Honorable John W. Bissell, U.S.D.C.J., granted defendants' motion to dismiss pursuant to Fed. R. Civ. Proc. 12(b)(6) (App. at 7a).

A Notice of Appeal to the United States Court of Appeals for the Third Circuit was filed on February 18, 1984. In his brief filed with the Court, Fitzpatrick conceded that the *Leis* opinion was "determinative" of all of the constitutional issues presented by his complaint and thus mandated affirmance of the District Court order. (Brief and Appendix for Appellant, United States Court of Appeals for the Third Circuit at p. 7). By Order dated September 21, 1984, the United States Court of Appeals for the Third Circuit affirmed the District Court judgement (App. at 1a).

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Summary of Argument

The writ sought here should be denied because, as petitioner conceded below, the *Leis* v. *Flynt*, 439 U.S. 438 (1979) opinion is determinative of the constitutional claims asserted herein. Furthermore, no subsequent rulings by the Court alter the conclusion that the imposition of a good cause showing for *pro hac vice* admission of attorneys, not authorized to practice in the State courts, does not violate either the Privileges and Immunities or the Equal Protection clauses of the United States Constitution. Finally, a substantial question exists as to whether the Federal District Court below erred in assuming jurisdiction over the complaint inasmuch as it seeks collateral review of a final State court judgment.

ARGUMENT

Petitioner's challenge to the State Court ruling denying his motion for *pro hac vice* admission as plaintiff's counsel in a medical malpractice action fails to state any viable claim under the Privileges and Immunities or Equal Protection Clauses and otherwise presents substantial jurisdictional deficiencies so as to mitigate against plenary review of the Petition.

In his zeal to cast this petition in terms of a privileges and immunities violation and thereby to entice the Court to consider this matter in conjunction with *Piper* v. *Supreme Court of New Hampshire*, 723 F.2d 110 (1st Cir. 1983) prob. juris. noted —— U.S. —— (April 23, 1984), petitioner ignores a fundamental element of a cause of action under that constitutional provision. As a careful reading of this Court's opinions makes clear, Article IV §2 of the United States Constitution is implicated solely

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where a State or political subdivision thereof legislatively establishes classifications which condition the exercise or granting of a privilege upon State or other residency grounds. *United Building and Construction Trades* v. *Mayor,* —— U.S. —— (1984). As noted in *Toomer* v. *Witsell,* 334 U.S. 385, 395 (1948), "[t]he primary purpose of the clause . . . was . . . to insure to a citizen of State A who ventures into State B the same privileges which the citizens of State B enjoy." Manifestly, and notwithstanding petitioner's arguments to the contrary, the distinctions drawn in N.J. Ct. R. 1:21-2(a) are based not upon State residency, but satisfaction of the requirements of N.J. Ct. R. 1:21-1(a), regarding authorization for practicing law in the State of New Jersey. See *Piper* v. *Supreme Court of New Hampshire, supra,* 723 F.2d at 115 n.5. Thus, an attorney, whether a domiciliary of New Jersey or another State, who does not hold a plenary license to practice in the State and/or who does not maintain a bona fide office for the practice of law in New Jersey, must, as a condition for appearance in the New Jersey courts, establish good cause for admission *pro hac vice* pursuant to N.J. Ct. R. 1:21-2(a). Petitioner's suggestion that invidious discrimination against out-of-state attorneys has been effected by application of the *pro hac vice* rule is thus utterly frivolous.* Similarly, given the absence

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* *United Building and Construction Trades* v. *Mayor, supra,* is not to the contrary. In that matter this Court concluded that a cause of action under the Privileges and Immunities Clause was stated where a challenged ordinance discriminated in favor of *some* State residents, (residents of the City of Camden) notwithstanding the fact that other State residents and non-residents were equally disfavored. In contrast, the applicability of R. 1:21-2(a) rests not upon any consideration of State or municipal residence but

(Footnote continued on following page)

of any demonstration by petitioners of any distinction made as between resident and non-resident attorneys in this context, petitioner's remaining equal protection challenge to the State court action herein similarly must fail. Compare *Zobel* v. *Williams*, 457 U.S. 55 (1982).* Review of the decisions below is plainly unwarranted.

Denial of the petition for certiorari is compelled as well by the significant issue, not addressed by the courts below, of whether the federal district court, consistent with this Court's ruling in *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983), could properly exercise jurisdiction over the complaint. As the complaint and

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(Footnote continued from preceding page)

authorization to practice in the State courts. As well, out-of-state residents, unlike those in the Camden case, do have the ability to seek modification of the Supreme Court of New Jersey's rules by the filing of a petition for review of the constitutionality or continued desireability of a rule. *Ethics Advisory Comm. Op. 475*, 89 N.J. 74, 80-81, 432 A.2d 59 (1981) app. dis. *sub nom Jacoby & Meyers* v. *Supreme Court of New Jersey*, 459 U.S. 962 (1982). See also *In re Sackman*, 90 N.J. 521, 448 A.2d 1014 (1982). They need not therefore be "restricted to the uncertain remedies afforded by diplomatic processes and official retaliation." *Toomer* v. *Witsell*, 334 U.S. 385, 395 (1948).

* The due process claim asserted in petitioner's Federal District Court Complaint is not presented in this petition. It should be noted however that as in *Leis* v. *Flynt*, 439 U.S. 438 (1979), the *pro hac vice* court rule at issue herein does not create any protectable property interest which would mandate satisfaction of due process requirements upon denial of the motion. Nevertheless, it is clear that unlike the procedural history presented in *Leis* v. *Flynt, supra*, petitioner was afforded "as much due process" as the Fourteenth Amendment would require: notice, an opporunity to be heard and an explication of the basis for denial of the claim. See *Board of Curators, Univ. of Mo.* v. *Horowitz*, 435 U.S. 78 (1978). See also App. at 8a to 15a.

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the question presented for review by this petition makes evident, petitioner's challenge herein is to a State trial judge's action (unaltered on appeal to the highest State court) in denying his motion for *pro hac vice* admission. Yet as the *Feldman* opinion reaffirmed, the federal trial courts lack subject matter jurisdiction to review final State court rulings pursuant to 28 U.S.C. § 1257(c). See also *Atlantic Line R. Co.* v. *Engineers,* 398 U.S. 281, 296 (1970). While petitioner's attempt in the first instance to seek review of the State trial court's action based upon the identical constitutional claims asserted herein was through the filing of interlocutory appeals to the Superior Court of New Jersey, Appellate Division, and thereafter to the highest State Court, the Supreme Court of New Jersey, this Court is not bound by petitioner's actions. Rather the Court could appropriately view the underlying decision and the denial of review by the appellate courts as final for purposes of 28 U.S.C. § 1257 in that a final ruling on a clearly severable and distinct matter was entered by the State courts. See *Cox Broadcasting Corp.* v. *Cohn,* 429 U.S. 469, 479 (1975); *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 468 (1978), *Ray* v. *Robinson,* 640 F.2d 474 (3rd Cir. 1981). *Cf* also *Adams* v. *Adams,* 53 N.J. Super. 424, 147 A.2d 568 (App. Div. 1959). Thus petitioner may have unwittingly mischaracterized his State appeal as one lying from an interlocutory order and accordingly lost his right to seek timely review by this Court of the state court ruling. That result, however, would neither compel nor justify the District Court asserting jurisdiction in the instant matter to review the State court rulings. See *Dist. of Col. Ct. of Appeals* v. *Feldman, supra* at 482-484 n.16; *Dickinson* v. *Petroleum Conversion Corp.,* 338 U.S. 507 (1950).

Even assuming, however, that the federal district court properly assumed jurisdiction of this matter and that petitioner in some unarticulated fashion has demonstrated

the discriminatory impact of R. 1:21-2(a) upon non-resident attorneys, there is no basis for this Court to consider in a plenary fashion the question addressed comprehensively in *Leis* v. *Flynt, supra,* namely, whether a State, consistent with federal constitutional principles, may preclude appearances in the State courts by attorneys, not authorized to practice therein, based upon the absence of any demonstration of necessity for participation in a particular case by that counsel. As this Court has repeatedly recognized, the States have an "extremely important interest" in the regulation and licensure of attorneys practicing in their courts. See *Middlesex Ethics Comm.* v. *Garden State Bar Assoc.,* 457 U.S. 423, 434 (1982). Accordingly, this Court has emphasized that the right to practice law in the State courts is neither a privilege nor immunity of State or United States citizenship nor a right otherwise independently created by federal law. *Leis* v. *Flynt, supra* at 442 n.4, 443;* *Silverman* v. *Browning* 414 F. Supp. 80 (D. Conn), aff'd 429 U.S. 876 (1976); *Norfolk and Western R. Co.* v. *Beatty,* 400 F. Supp. 234 (S.D. Ill.) aff'd 423 U.S. 1009 (1975); *Brown* v. *Supreme Court of Virginia,* 359 F. Supp. 549 (E.D. Va) aff'd 414 U.S. 1034 (1973); *In re Lockwood,* 154 U.S. 116, 117 (1894); *Bradwell* v. *The State,* 16 Wall. 130, 139 (1872). Likewise, the fact of admission to the bar of one State does not establish any correspondening right to practice in a sister state. *Leis* v. *Flynt, supra* at 443. Rather, as has been repeatedly recognized by this Court, any right to practice the legal profession is a matter exclusively one of State law origin and control subject only

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* Although petitioner now asserts that *Leis* v. *Flynt* is of no relevance to this case, in papers filed with the Courts below he conceded that all of the issues raised by his complaint were governed by the *Leis* ruling. See p. 8, *supra.* Based upon this concession alone, review should be denied.

to the requirement that the State not exercise its power in an arbitrary or discriminatory manner or in a way contemplated to deny First Amendment freedoms. *Id.* at 442; *Konigsberg* v. *State Bar of California,* 353 U.S. 252, 273 (1957).

In this regard, this Court has upheld numerous restrictions imposed upon nonresidents seeking to practice laws in a sister state. Thus, in *Martin* v. *Davis,* 187 Kan. 473, 357 P.2d 782 (S. Ct. 1960) app. dis. *sub nom. Martin* v. *Walton,* 368 U.S. 25 (1961) this Court dismissed for want of a substantial federal question a challenge under the equal protection clause to a Kansas statute and rules of court requiring that an attorney admitted to the Kansas bar but who also was admitted and regularly engaged in the practice of law in another State only be allowed to practice before Kansas courts and administrative agencies if he had the association of a Kansas lawyer. In upholding the constitutionality of the requirement, this Court acknowledged the validity of five factors cited by the Kansas Supreme Court as underlying the restriction: 1) provision to Kansas citizens of the service of a resident attorney familiar with local rules and procedure and upon whom service could be made; 2) difficulties encountered by Kansas Courts and commissions in obtaining the presence of attorneys from Missouri; 3) inability of Kansas-officed attorneys to effectuate service on Missouri-officed Kansas attorneys; 4) refusal of some Missouri-officed Kansas attorneys to answer emergency calls; and 5) failure of Missouri officed Kansas attorneys to familiarize themselves with Kansas rules of procedure and practice. 368 U.S. at 27-28. Notwithstanding the fact that the appellant, a Missouri attorney practicing across the Kansas border, was a resident of and maintained a general practice in Kansas and was familiar with local Kansas rules and procedure, this Court concluded that the chal-

lenged Kansas requirement as explicated by the Kansas Supreme Court constituted permissible regulation of out-of-State attorneys. The fact therefore of possible "incidental individual inequality" as applied to Mr. Martin was in this Court's view insufficient to warrant invalidation. 368 U.S. at 26.

Likewise in *Norfolk and Western Railway Co.* v. *Beatty, supra,* the Court declined to invalidate on federal constitutional grounds* an Illinois statute which permitted out-of-state attorneys to appear in court proceedings in "isolated cases" on a discretionary case-by-case basis. The three-judge court reached this result notwithstanding the fact that

> . . . the cases [were] of federal origin, that the Plaintiffs' attorneys have been permitted to appear without limitation numerous times in the past, that the cases are presently being prepared for trial, that the Plaintiffs' attorneys are specialists regularly representing Plaintiffs in Madison County and elsewhere, that Plaintiffs in the state cases have freedom to select the forum of their choice, that the accidents involved occurred elsewhere, that Plaintiffs' attorneys have caused no disciplinary problems— [*Id.* at 237].

As the Court aptly noted:

> To view it otherwise would be for this Court to create a limited federal or national bar and to impose it on the states. To do so would be in total disregard of the state's great interests in the con-

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* The decision does not reveal what specific constitutional claims were asserted.

> trol and supervision of the practice of law in its own courts through reasonable requirements for licensing and admission. [*Ibid.*]

Consistent with these rulings, and for the reasons expressed in Point I of the Supreme Court of New Hampshire's brief submitted in *Supreme Court of New Hampshire* v. *Piper,* this Court should conclude that the practice of law does not fall within the purview of the Privileges and Immunities Clause. Yet even assuming that the Court decides to the contrary in *Piper* and further, invalidates the residency requirement therein, there is no need for this Court to address the wholly independent issue of a State's regulation in its courts of the practice of law by those out-of-state attorneys who have not sought admission to the bar. As this Court has repeatedly emphasized, the privileges and immunities clause "is not absolute," *Toomer and Witsell, supra* at 396, and this does not preclude discrimination against citizens of other states where there is a "substantial reason" for the difference in treatment. *Id.* at 398. Even assuming petitioner's establishment of any distinction in the treatment of non-resident attorneys in this context, the State undisputedly has a substantial interest in limiting the circumstances in which those attorneys, who have never demonstrated to the satisfaction of the State courts their competency to practice law, may appear in State proceedings.

CONCLUSION

It is respectfully submitted that for these reasons the petition for *certiorari* should be denied.

Dated: January 21, 1985

Respectfully submitted,

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No. 84-1095

Office-Supreme Court, U.S.
FILED
FEB 13 1985
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1984

HENRY B. FITZPATRICK, JR.,

Petitioner,

vs.

I. V. DiMARTINO, A.J.S.C. AND THE SUPERIOR COURT, LAW DIVISION, GLOUCESTER COUNTY, NEW JERSEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

ARGUMENT

The district court did not err in assuming jurisdiction herein since the New Jersey Supreme Court's denial of petitioner's motion for leave to appeal an interlocutory order was not a final determination of the merits of petitioner's claim; and the federal courts have jurisdiction to hear generalized constitutional challenges to rules promulgated by the New Jersey courts.

In their reply, respondents have alleged that the district court erred in assuming jurisdiction inasmuch as petitioner's challenge

"is to a state trial judge's action (unaltered on appeal to the highest state court) in denying his motion for *pro hac vice* admission." (Respondent's Brief, page 12).

In support of this contention, respondents cite *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), as dispositive of this jurisdictional question. In *Feldman,* bar applicants, Feldman and Hickey, sought declaratory and injunctive relief which would have compelled their admission to the District of Columbia bar or allowed them to sit for the examination, despite their failure to fulfill the requirement of graduation from a law school accredited by the American Bar Association as prescribed by Rule 46 I(b)(3) promulgated by the District of Columbia Court of Appeals. Respondent Feldman stated in his claim that "defendant's refusal to consider [his] individual qualifications to practice law is unlawful in view of his demonstrated fitness and competence, as well as the prior admission to the District of Columbia bar of several individuals who did not attend an accredited law school." *Id.* at 1307. Feldman sought a "declaration that defendant's actions have violated the Fifth Amendment to the Constitution and the Sherman Act, and . . . an injunction requiring defendants either to grant [him] immediate admission to the District of Columbia bar or to permit him to sit for the bar examination." *Id.*

Respondent Hickey's complaint was framed in much the same way, except that Hickey simply sought an order requiring defendants to allow him to sit for the bar examination at the earliest possible date. *Id.* at 1310.

In *Feldman*, this Court bifurcated its jurisdictional analysis since a close reading of the complaint disclosed that the petitioners had mounted a general challenge to the constitutionality of the rule *and* sought review of the District of Columbia Court of Appeals' decision in their particular cases. In the former claim,

petitioners asserted that the rule adopted by the District of Columbia Court of Appeals, which required proof of graduation from a law school accredited by the American Bar Association as a prerequisite for sitting for the bar examination, was unconstitutional because "it creates an irrebuttable presumption that only graduates of accredited law schools are fit to practice law, discriminates against those who have obtained equivalent legal training by other means, and impermissibly delegates the District of Columbia Court of Appeals' power to regulate the bar to the American Bar Association." *Id.* at 1317. This Court held that the district court had subject matter jurisdiction over these elements of petitioners' complaint because a resolution of this issue would not require a review of a judicial decision in a particular case.

In analyzing the second claim proffered by Feldman and Hickey, the Court initially discussed whether the District of Columbia Court of Appeals had acted judicially when it refused to waive the requirement of graduation from a law school accredited by the American Bar Association. This was the crux of the jurisdictional issue. If the decision was a judicial one, then, pursuant to 28 U.S.C. §1257, the decision would constitute a final judgment of a state court. In that event, review thereof could be had only in the United States Supreme Court.

In deciding this issue, this Court recognized that the nature of a proceeding " 'depends not upon the character of the body but upon the character of the proceedings.' " *Feldman*, 460 U.S. at 1312, quoting *Prentis v. Atlantic Coastline*, 211 U.S. 210 (1908). Further, the Court noted that a judicial inquiry " 'investigates, declares and enforces liabilities as they stand on present or past facts' "; and that a nonjudicial inquiry is more legislative in nature and " 'looks to the future and changes existing conditions by making a new Rule to be applied thereafter to all or some part of those subject to its power.' " *Id.*

Therefore, with *Prentis* as precedent, this Court analyzed the proceedings in the District of Columbia Court of Appeals to determine whether they were judicial in nature and thus, appealable only to the United States Supreme Court. In his petition, Feldman contended that he possessed "the requisite fitness and good moral character necessary to practice law in this jurisdiction." *Id.* at 1313. In support of his position, he described in detail his legal training and experience. He asserted that his professional education and training were "equal to that received by those who had attended an ABA approved law school." *Id.* In essence, Feldman argued on policy grounds that the rule should not be applied to him because he had fulfilled the spirit, if not the letter, of that requirement. *Id.* The Court concluded that the proceedings in the District of Columbia Court of Appeals were judicial in nature because that court was required to determine "in light of existing law and in light of Feldman's qualifications and arguments whether Feldman's petition should be granted." *Id.* at 1314. Thus, to that extent the district court lacked subject matter jurisdiction over that element of the complaint.

In the instant case, it is clear that the *Feldman* decision in no way supports respondents' position that the district court lacks subject matter jurisdiction over petitioner's claim. Most fundamentally, *Feldman* stands for the proposition that the United States district courts may not assume jurisdiction over final judgments rendered by a state's highest court in a judicial proceeding. Petitioner does not contest this fundamental proposition. Rather, in the present case, pursuant to 28 U.S.C. §1343(a)(3), the United States District Court of New Jersey properly exercised original jurisdiction over petitioner's claim that the respondents' refusal to permit his admission *pro hac vice* in the absence of a specific finding that he is unfit or that substantial reasons exist which would justify his exclusion constitutes a violation of his constitutional rights. Petitioner was not seeking review of a decision rendered by the New Jersey Supreme Court. Indeed, the New Jersey Supreme Court refused to allow petitioner

to appeal an interlocutory order of the Superior Court of New Jersey. This refusal by that court distinguishes this case from *Feldman*. Unlike *Feldman*, petitioner never had an opportunity to argue fact or policy before the New Jersey Supreme Court and that court never made a judicial (or any) determination of fact or policy. It refused to allow the appeal. Thus, initiating a civil suit in the United States District Court of New Jersey was the only redress available to petitioner to vindicate the abridgement of his constitutional rights.

Moreover, assuming *arguendo* that the New Jersey Supreme Court's refusal to grant petitioner's motion for leave to appeal an interlocutory order is, in fact, a final determination of petitioner's claim herein, *Feldman* still does not require this Court to hold that the district court had no subject matter jurisdiction in this case. In *Feldman*, this Court recognized that the state supreme courts may act in a nonjudicial capacity in promulgating rules regulating the bar. Such a practice is exactly what the Supreme Court of New Jersey has done in this instance. New Jersey Court Rules, 1969, R. 1:21-2 was promulgated to regulate the appearance of out-of-state counsel in court proceedings in New Jersey. It specifies that the court can exercise its discretion in allowing out-of-state attorneys to appear. However, no explicit guidelines are given to regulate this discretion. In the instant case, the Superior Court of New Jersey was relying on the rule as construed by *Burlington County Internal Medical Associates, P.A. v. American Medicorp. Inc.*, 168 N.J. Super. 382, 403 A.2d (1979) when it ruled that petitioner should not be allowed to appear in court. Petitioner has argued that this rule, as promulgated and enforced by the New Jersey courts, is *inherently* unconstitutional because the factors which the courts evaluate to determine whether out-of-state counsel should be permitted to appear in New Jersey courts have no correlation to the underlying end sought to be achieved by the rule. Petitioner was not asking the district court to evaluate the rule as the Superior Court of New Jersey applied it to him. Rather, petitioner sought that this rule be viewed out

of context to any particular application since the rule as it stands discriminates against *any* out-of-state attorney who wishes to represent a client in New Jersey. Therefore, in this instance, the district court was not required to review a judicial decision of the New Jersey Supreme Court.

This analysis is consistent with that employed by the Tenth Circuit in *Razatos v. Colorado Supreme Court*, 745 F.2d 1429 (10th Cir. 1984). In *Razatos*, the Colorado Supreme Court had adopted rules governing the procedures by which disciplinary proceedings may be brought against attorneys in Colorado. The rules established that when a charge is filed, a grievance committee should be empanelled which conducts a formal hearing during which witnesses are sworn, testimony taken and a complete record made. If the panel finds that the charges are proven, it recommends appropriate disciplinary action to the Colorado Supreme Court. The facts in *Razatos* established that a grievance was filed against Razatos, and that a committee was formed which held a hearing and recommended that Razatos be suspended from the practice of law. The Colorado Supreme Court adopted the panel's recommendation and suspended Razatos for three years. He appealed the court's decision to the United States Supreme Court, which denied the appeal. Thereafter, Razatos commenced a §1983 action in the United States District Court against the Colorado Supreme Court and its justices. The district court dismissed the claim for lack of subject matter jurisdiction and, alternatively, on the ground that the rule was not demonstrated to be constitutionally invalid.

In addressing the jurisdictional question, the United States Court of Appeals for the Tenth Circuit ruled that the district court did have jurisdiction to the extent that Razatos had claimed that the rule violated the due process clause of the Fourteenth Amendment to the Constitution. In order to evaluate that constitutional challenge, the court reasoned that the district court

need not review the decision of the Colorado Supreme Court. Rather, it need only look to the rule as promulgated by the court and as construed by state case law. The constitutional challenge in *Razatos* was framed in such a way as to uphold the exercise of subject matter jurisdiction by the district court.

Herein, petitioner framed his claim in a similar way. He does not question that New Jersey Rule R. 1:21-2 applies in this case and his claim does not assert any particular application of the rule. Rather, petitioner contests the inherent constitutional invalidity of criteria applied by the New Jersey courts to *pro hac vice* admissions. Accordingly, the district court properly exercised jurisdiction.

Similarly, in *Schwartz v. Judicial Retirement System of New Jersey*, 584 F. Supp. 711 (1984), plaintiff challenged the constitutional validity of a New Jersey statute and an administrative directive of the New Jersey Supreme Court, both of which prohibited retired state judges receiving pensions from engaging in certain forms of private law practice. Plaintiff, a retired judge of the New Jersey Superior Court, sought clarification from the Supreme Court of New Jersey as to the ethical propriety of accepting a position as county counsel. The Supreme Court of New Jersey advised plaintiff that such employment would be impermissible under the statute and rule.

Plaintiff filed an action in the United States District Court for the District of New Jersey asserting constitutional challenges to the statute and rule. The court considered whether the plaintiff's actions constituted an "impermissible attempt to 'appeal' a decision of the New Jersey Supreme Court to this Court." *Id.* at 715. After considering *Feldman* and *Prentis*, the court noted that "plaintiff's grounds for objection are inherent in the regulations, and do not turn on any particular application of them." *Id.* at 715, 716. The court held that it had jurisdiction

over plaintiff's claim and specifically distinguished the case where a plaintiff claims a rule is incorrectly applied to a particular case.

Clearly, in the present case, petitioner's constitutional claims do not turn on any "particular application" of the New Jersey rule. Rather, his claims are grounded in the "inherent" unconstitutionality of the rule itself. Thus, jurisdiction in the District Court of New Jersey was proper.

Finally, in *Piper v. Supreme Court of New Hampshire*, 723 F.2d 110 (1st Cir. 1983), *prob. juris. noted*, 104 S. Ct. 2149 (1984), it was again recognized that district courts have jurisdiction to hear generalized constitutional challenges to state bar rules. In *Piper*, an attorney who was a resident of Vermont, petitioned the New Hampshire Supreme Court for a dispensation from a rule promulgated by that court which requires that a bar applicant must "either [be] a resident of the State of New Hampshire or [have] filed a statement of intention to reside in the State of New Hampshire." The New Hampshire Supreme Court denied her petition. Subsequently, Piper filed a complaint in the United States District Court for the District of New Hampshire, claiming that the residency requirement for admission to the bar violated the privileges and immunities clause of the United States Constitution. The district court rendered a judgment in favor of Piper. On original submission, a divided panel of the Court of Appeals reversed the judgment. Upon granting a petition for rehearing *en banc*, the Court of Appeals vacated the panel's judgment. Upon *en banc* reconsideration, the Court of Appeals was divided 2-2. Therefore, the decision of the district court was affirmed by an equally divided vote.

It is important to note that one of the two *en banc* opinions recognized that the *Feldman* holding did not mandate dismissal of plaintiff's claim for lack of jurisdiction. The opinion states:.

> After oral argument was heard by the panel, the Supreme Court decided *District of Columbia Court of Appeals v. Feldman*, ____ U.S. ____ 103 Supreme Court 1303, 75 L. Ed. 2d 206 (1983). Appellant has suggested to us that *Feldman* requires the dismissal of the instant case for lack of jurisdiction. We disagree. *Feldman* holds that a Federal District Court may not sit in review of a state court's application of a bar requirement to a particular individual's case. *Feldman* indicates, however, that Federal Courts have jurisdiction to hear generalized constitutional challenges to state bar rules. Piper's challenge is generalized. She does not question that Rule 42 applies in her case, but rather contends that such a residency requirement is unconstitutional in all cases.

Id. at 118 n.1. Herein, petitioner is making the same generalized claim. He contends that in the absence of a specific finding that he is unfit or that substantial reasons exist which would justify his exclusion, Rule R. 1:21-2 is unconstitutional since it violates the privileges and immunities clause of the United States Constitution.

Thus, since this Court has held in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), that challenges to the constitutionality of state bar rules do not necessarily require a United States district court to review a final state court judgment in a judicial proceeding, the United States District Court of New Jersey did not err in assuming subject matter jurisdiction herein. Such assumption of jurisdiction was proper since the proceedings giving rise to Rule R. 1:21-2 were non-judicial in nature and, therefore, the policies prohibiting United States district court review of final state court judgments are not implicated.

CONCLUSION

The United States District Court of New Jersey did not err in assuming jurisdiction herein. The Supreme Court of New Jersey did not render a final determination on the merits of petitioner's claim. Therefore, to that extent, the holding in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), is inapplicable. Further, to the extent that *Feldman* also holds that federal district courts do have subject matter jurisdiction over generalized constitutional challenges to state bar rules, the district court was correct in assuming jurisdiction herein since petitioner's claim is not to any particular application of Rule R. 1:21-2 to him. Rather, Rule R. 1:21-2 is inherently unconstitutional in that it violates the privileges and immunities clause of the United States.

Respectfully submitted,

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